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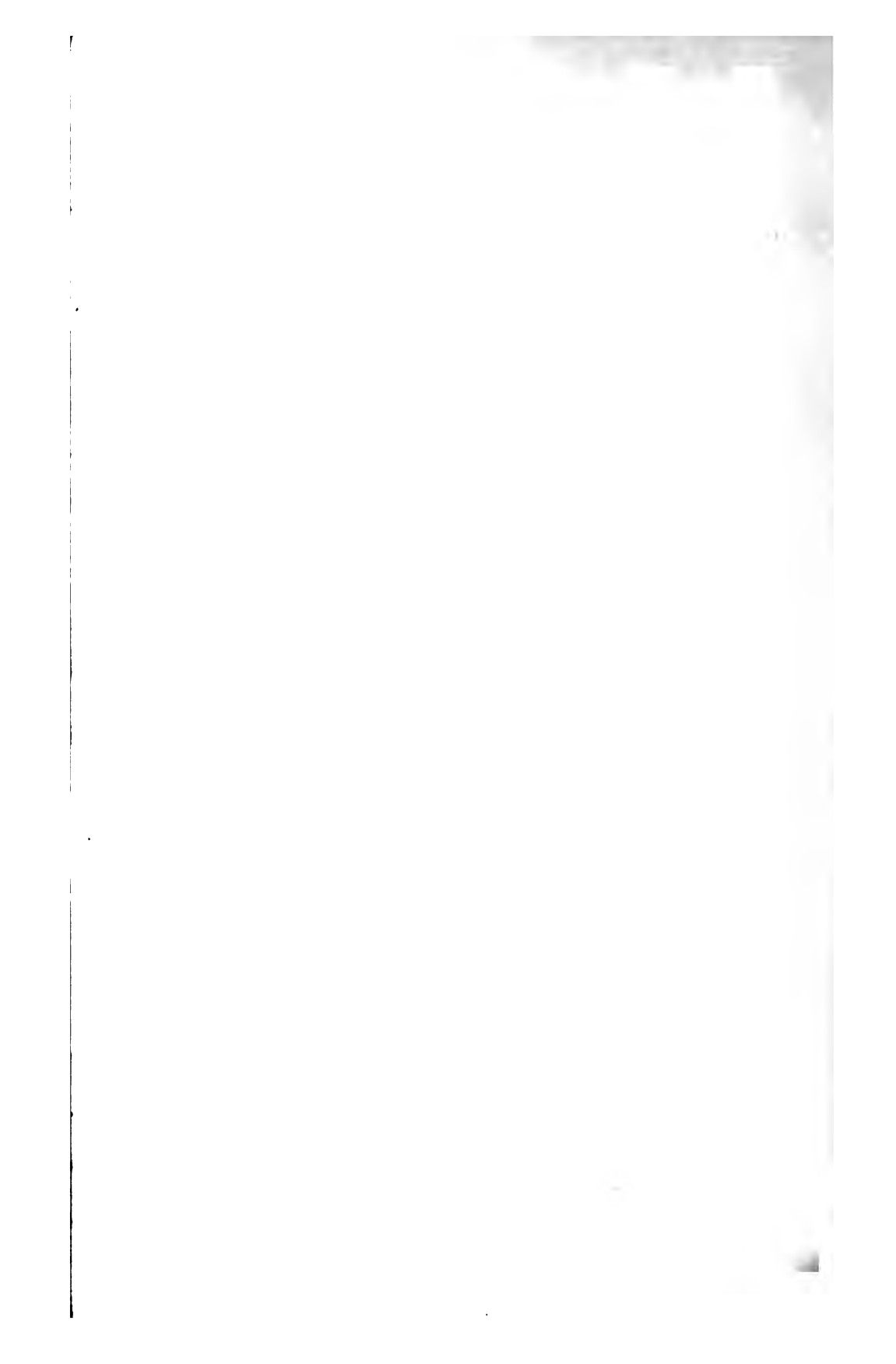
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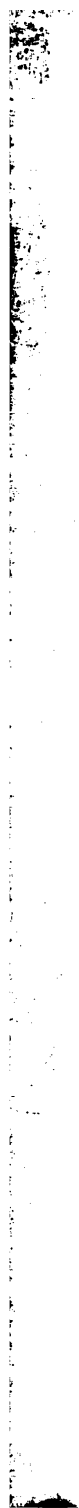
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S. Sumner

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C







**LOTTERIES, FRAUDS ^{AND} OBSCENITY
IN THE MAILS.**

BY
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Postoffice Department.

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PREFACE.

THE author offers no apology for presenting this treatise to the public. While Assistant Attorney-General for the Postoffice Department he saw or thought he saw need for some work that would guide postal officers, the publishers of newspapers, the Bench and Bar and the people generally in determining what is non-mailable matter on account of its relation to lottery and fraudulent schemes and obscenity. There is now no work on this subject in this country or any other so far as the author knows, and a judge, attorney or postal official, desiring information on the subject of non-mailable matter of this character, must go through the decisions of the various State and Federal Courts. These cases are grouped into classes so the reader can easily find what he wants.

That the work is imperfect is admitted and it is evident it might have been made more or less voluminous but the different subjects have been treated as briefly as possible, consistent with clearness.

While the author has taken the liberty of freely criticizing the decisions of the courts and officers, when he deemed it proper, he has given all the cases he could find whether they contained views in consonance with his own or not and it is left to a generous public to determine whether the criticism be just or unjust.

THE AUTHOR.

DeSoto, Missouri.

January 15, 1900.



TABLE OF CASES CITED.

A

	Section
Alabama, Boyd v.....	305
Alexander, Parsons v.	20
Alexander v. State	62
Allgeyer v. State	294
Allport v. Nutt	20, 138
Alvord v. Smith	21, 47, 48
Am. Art Union, Bennett v.	76
Am. Art Union, Governors, etc. v.	76, 86, 111
Am. Art Union, People v.	76
Am. Print Works v. Lawrence	299
Anderson v. Baker	285
Anderson, Smith v.....	165
Andrews, U. S. v.	224
Applegarth v. Colley	20
Association v. Ramsdell	49
Association v. State	76, 83
Association, State v.....	15
Association v. Zumstein	287, 288, 291
Atherford v. Beard	65
Aufmordt v. Hedden	269, 279
Auget v. Hedden	269

B

Baker, Anderson v.	285
Bagley v. State	51
Ballard v. Brown	21, 48
Ballock v. State	7, 15
Bamble v. State	52
Bank, Cunningham v.	36
Bank v. Merchant.. ..	286, 287
Barbin v. Connolly	296, 299
Barclay v. Pearson	90, 97, 103
Bartlett v. Kane.....	269
Barin, Metropolitan Board v.	305
Baskets Campagne v. U. S.....	281
Batty v. Marriott.....	20
Bayland v. State	11
Beach, U. S. v.....	244
Beadles v. Bless	38
Beadon, Sykes v.	164, 165, 175
Beale, Ellis v.	51
Beard, Atherford v.	65
Beatty, U. S. v.....	19, 223
Belcher v. Linn	269
Bell v. State	11, 13, 42, 83, 85, 181, 186
Bennett v. Am. Art Union	76

Bennett. U. S. v.	242
Benson v. McMahan	242
Bernard v. Taylor	65
Berry, Rumsey v.	33
Bills, Fleming v.	187
Black, U. S. v.	276
Blackman, Morris v.	69, 90, 96, 97
Blair v. Ridgely.....	285
Blanchard, Ex Parte	15, 76
Bland v. Collett	65
Blaxton v. Pye.....	51
Blazin v. Miller.....	299
Bless, Beadles v.	38
Blockham v. Gresham	270
Board of Health, People v.	295
Boardman v. Thompson	283
Boneil, State v.	79
Bonsall, Kirkpatrick v.	40
Book, State v.	59
Borden, Luther v.	262, 263
Borden, Doe v.	264
Boston Beer Co. v. Massachusetts.....	304, 305
Boyd v. Alabama	305
Boyd v. State	76
Boyle, U. S. v.	237
Bradberry, Fairfield Floral Co. v.....	291, 292
Bradshaw, O'Connor v.....	163
Brand v. U. S.	216, 228
Branham v. Stallings.....	115
Brashear v. Mason	259, 268
Britton, Irving v.	143
Bronson's Ag. Ass'n v. Ramsdell.....	49
Brown, Ballard v.	21, 48
Brown v. Leeson	65
Brown v. Overberry	20
Brown, U. S. v.	238
Brua's Appeal	39, 170
Bryant, State v.	78b
Buck v. State	11
Buckalew v. State, ...	177, 179, 186
Burgess v. Gray	262
Burnell, U. S. v.	239
Bushnell v. Leland	272
Russell, Swaine v.....	116

C

Cannon v. Quick	55
Caminda v. Hulton.....	125, 139, 140, 141
Casey v. Galli	272
Castello v. Curtis	48
Chaney P. L. Co. v. Hart	118
Chapman, Elders v.	122
Charles, Seidenbender v.....	7, 15, 70, 120
Chavanah v. State	181, 191
Cheatham v. U. S.	279
Cheek v. Com.....	50
Cheesum v. State	51
Chesman, U. S. v.....	242
Choe Chan Ping v. U. S.	277, 281
C. & L. T. Co. v. Sandford.....	291

Table of Cases Cited.

vii

Christensen v. Crowley	300
Chubb, Com. v.	191
City Produce Exchange v. McGrew	42
Clark v. Com.	50
Clark, State v.	11, 84
Clark, U. S. v.	242, 244
Clayton v. Jennings	55
Cody, Goodman v.	66
Cohn v. Koehler	191
Colgan, Crofton v.	20
Collett, Bland v.	65
Colley, Applegarth v.	20
Colman, Ferguson v.	45a
Columbia Investment Co.	155
Comly v. Hillegrass	49
Commissioners, U. S. v.	254
Commissioner v. Whitely	271, 313
Commerford v. Thompson	287, 288, 291
Com., Cheek v.	50
Com. v. Chubb	191
Com., Clark v.	50
Com. v. Emerson	74, 110
Com. v. Gourdin	59
Com. v. Landis	242
Com. v. Manderfield	118
Com., Miller v.	80
Com. v. Sheriff	80, 191
Com. v. Simonds	53
Com. v. Taylor	59
Com. v. Tilton	51
Com. v. Wright	182, 191
Connolly, Barbin v.	296, 299
Coombs v. Dibble	20
Cortes v. Jacobus	280
Costello v. Curtis	48
Cox, Hall v.	125
Crickett, Hussey v.	65
Crofton v. Colgan	20
Cross v. People	15
Crowley v. Christensen	300
Culbertson, Lyon v.	35
Cunningham v. Bank	36
Curtis, Costello v.	48

D

Dalmar, Rolfe v.	76
Davenport v. Ottoway	83
Davis, U. S. v.	237
Dauphin v. Key	285, 286, 287, 288
Day, Porter v.	48
Deboy, State v.	61
Decatur v. Paulding	257, 268, 273
DeCosta v. Jo es	65
Delier v. Society	21
Dent v. State	277
Devlin, Negley v.	15, 76, 82
Dibble, Coombs v.	20
Dill, Pearce v.	41
Dinsman, Wilkes v.	254

Dion v. St. John Baptist Church.....	175b
Dodds, Rep. v.....	135, 137
Dodge, U. S. v.....	240
Doe v. Borden.....	262, 264
Doran, Ex Parte.....	297
Douglass v. Kennedy.....	305
Dudley, Luddington v.....	143
Dunham v. St. Croix M'fg Co.....	136, 137
Dunlop v. U. S.	245
Dunn v. People	15, 70, 78a, 191
Durland v. U. S.....	201
Dwyer, Ex Parte	143

E

Eagerton v. Furzeman	51
Earl of March v. Pigot	65
Earnshaw v. U. S.	282
Edwards v. State	51
Ekiu v. U. S.	280
Elders v. Chapman	122
Eldred v. Malloy	37
Elliott, Good v.	65
Elliott, People v.	11, 112, 144
Elliott, U. S. v.....	237
Ellis v. Beale.....	51
Emerson, Com. v.....	74, 110
Equitable Investment Co.	169
Eubanks v. State	15, 42, 78
Evans v. Jones	65

F

Fairfield Floral Co. v. Bradberry.....	291, 292
Faley v. Harrison	262
Fall, Johnson v.	38
Fallon, People ex rel. v.....	21, 28a, 29, 145
Fay, U. S. v.	205, 206
Felton, Teal v.	274
Ferguson v. Colman.....	45a
Ferriera, U. S. v.....	261, 262
Fertilizing Co. v. Hyde Park	303
Field, Gatty v.....	139
Finney, U. S. v.....	229
Fisk, Ex Parte	281
Fleming v. Bills	187
Flynn, Scollans v.....	51
Fong Yue Ting v. U. S.....	281
Fontenberry v. State.....	34
France v. State	13
Freeman, Reg. v.....	51
Fulkerson, U. S. v.....	7, 172
Furzeman, Eagerton v.....	51

G

Gaines v. Thompson.....	265
Galli, Casey v.	272
Gamble v. State	52
Gatty v. Field.. ..	139
Gee, U. S. v.....	239

Table of Cases Cited.

ix

Gibbons v. Governor, etc.	21, 48
Gibson, Kennedy v.	272
Gilbert v. Syker	65
Gill, Wilkinson v.	7, 111
Gillson, People v.	74, 110
Golden Rule v. People	43
Good v. Elliott	65
Goodburn v. Marley	51
Goodman v. Cody	66
Gourdin, Com. v.	59
Governors, etc. v. Am. Art Union	76, 86, 111
Grace v. McElroy	51
Gray, Burgess v.	202
Gray v. Reilly	144
Gresham, Blockham v.	270
Gridley v. Lord Palmerston	267
Griffin, Mosher v.	51
Griffin v. Pembroke	237
Grimes, State v.	189
Grimm v. U. S.	244
Gueras, Henkins v.	65
Gupton, State v.	64
Guthrie, U. S. v.	268

H

Haeflinger, U. S. v.	219
Hall v. Cox	125
Hamilton v. State	62
Harmon, U. S. v.	242, 253
Hankins v. Ottinger	21, 47
Harlen v. U. S.	56
Harley v. Rice	65
Harris, Reg. v.	96, 184, 191
Harris v. White	21, 145
Harrison, Faley v.	262
Hart, Chaney P. L. Co. v.	118
Haynes, U. S. v.	218
Hazlett, Jacobus v.	176, 241
Health Department v. Rector	295
Hedden, Aufmordt v.	269, 279
Hedden, Auget v.	269
Henkins v. Gueras	65
Hessing, Lansing v.	293
Hetton v. Merritt	269, 280
Hicklin, Queen v.	242
Hill, Trimble v.	20
Hillegrass, Comly v.	49
Hoboken L. & I. Co., Murray v.	262, 264, 269, 280
Holman v. State	15, 80, 191
Holmes v. Hunt	281
Holt v. Wood	108
Hoover v. McChesney	290, 291a, 292, 311
Hopkins, Yick Wo v.	280
Horner v. U. S.	7, 11, 15, 70, 73, 170, 175, 191, 192, 249, 253
House's Case	299
Houston, New Orleans v.	306
Howell, King v.	51
Hoyt, Rankin v.	282
Hudelson v. State	15, 83, 123, 134, 136

Huffman, McLain v.	51
Hull v. Ruggles	11, 15, 87, 111
Hull v. State	49
Hulton, Caminada v.	125, 139, 140, 141
Hunt, Holmes v.	281
Hunt, Railroad v.	299
Hussey v. Crickett	65
Hyde Park, Fertilizing Co. v.	303

I

Irving v. Britton	143
Irwin v. Osborne	20

J

Jackson, Ex Parte.	192, 252, 253, 284, 292
Jacobus, Cortes v.	280
Jacobus v. Hazlett	176
Jamieson, Reg. v.	136, 137
Jarvis, U. S. v.	244
Jasper Land Co. v. Paulk	119
Jennings, Clayton v.	55
Jones, De Costa v.	65
Jones v. Ramsdell	65
Jones, U. S. v.	200, 214
Johnson v. Fall	38
Johnson v. Lansley	20
Johnson, Mississippi v.	265
Johnson v. State	51
Jung Ah Lung, U. S. v.	280

K

Kane, Bartlett v.	269
Kansas, Mugler v.	301, 302
Kansas v. Zeibold	301
Kansas Mer. Ass'n, State v.	15
Kendall v. Stokes	256, 267, 268, 274
Kennedy v. Gibson	272
Kentucky, Patterson v.	305
Key, Dauphin v.	285, 286, 287, 238
Kidd v. Pearson	299
King v. Howell	51
Kingsman, Eltham v.	65
Kirkpatrick v. Bonsall	40
Knapp, Misner v.	21
Koehler, Cohn v.	191
Kohlshorn v. State	178
Knox, U. S. v.	272
Korten v. Seney	11

L

Lamar, U. S. v.	275
Lamkin, U. S. v.	245
Lander v. P. A. T. Soc.	121
Landis, Com. v.	242
Lansburg v. U. S.	110
Lansing v. Hensing	293
Lansley, Johnson v.	20
Lawrence, Am. Print. Works v.	299

Table of Cases Cited.

xi

Lawton v. Steele.....	299
Lee Tong, Ex Parte	60
Leeson, Brown v.	65
Leighton, State v.	59
Leland, Bushnell v.	272
Ling, U. S. v.	244
Linn, Belcher v.	269
Loiseau v. State	11, 13, 177
Long v. State.....	7, 74, 110
Longbotham, Lynall v.	51
Lord Palmerston, Gridley v.	267
Loring, U. S. v.	209
Lovell, State v.	102, 139, 143
Lucas v. Wallace	107
Luddington v. Dudley	143
Lumsden, State v.	11, 13, 191
Luther v. Borden.	262, 263
Lutz, U. I. Ass'n v.	147, 174
Lynall v. Longbotham	51
Lynch v. Rosenthal	69, 123, 124
Lyon v. Culbertson	35

M

Madison, Marberry v.	255
Magdaline College Case	84
Malloy, Eldred v.	37
Manderfield, Com. v.	118
Manser, State v.	59
Marberry v. Madison	255
Marley, Goodburn v.	51
Marriott, Batty v.	20
Martin v. Mott.....	258, 280
Martin, U. S. v.	244, 245
Mason, Brashear v.	259, 268
Massachusetts, Boston Beer Co. v.	304, 305
Matthews, Railroad Co. v.	291
McChesney, Hoover v.	290, 291a, 292, 311
McDonald, U. S. v.	44, 161, 166, 170
McElroy, Grace v.	51
McGrew v. City Produce Exchange	42
McLain v. Huffman	51
McLanahan v. Mott	69, 173
McLaughlin v. N. M. I. Co., ...	110, 170
McMahon, Benson v.	280
Merchant, Bank v.	286, 287
Merritt, Hetton v.	269, 280
Metropolitan Board v. Barin	305
Miller, Blazin v.	299
Miller v. Com.	80
Misner v. Knapp	21
Mississippi v. Johnson	265
Mitchell, U. S. v.	216
Monroe v. Smelly	7
Moren, State v.	15, 184
Morris v. Blackman	69, 90, 96, 97
Mossbaugh, Washington Glass Co. v.	124
Mosher v. Griffin	51
Mott, McLanahan v.	69, 173
Mugler v. Kansas	301, 302

Mumford, State v.	15, 83, 89
Murphy v. Rogers	59
Murray v. Hoboken L. & I. Co.	262, 264, 269, 280
M. Society, Wallingford v.	165

N

Nathan, U. S. v.	244
National Endowment Co.	170
National In. Co. of Worthington.	152
National In. Co. of Cincinnati.	154
National In. Soc. v. Sherwood.	168
N. M. B. & I. Co. v. McLaughlin.	110, 170
Negley v. Devlin.	15, 76, 82
Neil v. Ohio	273
New Orleans v. Houston	306
New Orleans v. Paine	265
New York, Stone v.	290
Nutt, Allport v.	20, 138
Noble v. U. R. L. R. Co.	265
Noelke, People v.	11

O

O'Connor v. Bradshaw	163
Ogden v. Saunders	281
Ohio, Neil v.	273
Old Colony Co. v. Sherwood.	167
Olney, U. S. v.	15, 114, 123, 184, 237
Orear, Thornhill v.	183
Osborne, Irwin v.	20
Ottinger, Hankins v.	21, 47
Ottoway, Davenport v.	83
Overberry, Brown v.	20
Overton, State v.	76
Owens, U. S. v.	217

P

P. A. T. Soc., Lander v.	121
Paine, New Orleans v.	265
Palmer v. State	49
Parker, Queen v.	95
Parsons v. Alexander	20
Passavant v. U. S.	269, 282
Patterson v. Kentucky	305
Paulding, Decatur v.	257, 268, 276
Paulk, Jasper Land Co. v.	119
Payne, People v.	180
Pearce v. Dill	41
Pearson v. Barclay.	90, 97, 103
Pearson, Kidd v.	299
Pearson, Wilson v.	199
Pembroke, Griffin v.	237
Pennsylvania, Powell v.	298
People v. Am. Art Union	76
People v. Board of Health.	295
People, Cross v.	15
People, Dunn v.	15, 70, 78a, 191
People v. Elliott	11, 112, 144
People ex rel. v. Fallon	21, 28a, 29, 145

Table of Cases Cited.

xiii

People v. Gillson.....	74, 110
People, Golden Rule v.	43
People v. Noelke.....	11
People v. Payne	180
People v. Reily	142
People, Swigert v.	52
People, Thomas v.	15, 98, 191
People v. Weithoff	51
Pettis Co. B. & I. Co.	151
Phalen v. Virginia	305
Pillow v. Roberts	281
Pigot, Earl of March v.....	65
Politzer, U. S. v.	190
Porter v. Day	48
Portis v. State	189
Powell v. Pennsylvania	298
Provident B. & I. Co.	150
Pye, Blaxton v.	51

Q

Queen v. Parker	95
Queen v. Hicklin	242
Quick, Cannon v.	55

R

Railroad v. Hunt	299
Railroad v. Matthews	291
Railroad v. Noble	265
Railroad v. Stimpson	266, 280
Ramsey v. Berry	33
Ramsdell, Bronson Ag. Ass'n v.....	49
Randall, Jones v.....	65
Randall v. State	7, 15, 77
Rankin v. Hoyt	282
Rapier, Ex Parte	192, 252, 253, 292
Rapp, Schriber v.	174
Rector, Health Department v.	295
Reeves v. State	186
Reg. v. Dodds	135, 137
Reg. v. Freeman	81
Reg. v. Harris	96, 184, 191
Reg. v. Jamieson	136, 137
Reid, U. S. v.	206, 207
Reily, People v.	142
Rice, Hartley v.	65
Ridgely, Blair v.	285
Ridgeway v. Underwood	123
Roberts, Pillow v.	281
Roddy v. Stanley	90
Rogers, Murphy v.	59
Rolfe v. Dolman	76
Rosen, U. S. v.	246
Rosenthal, Lynch v.	69, 123, 124
Rowland, Ex Parte	276
Ruggles, Hull v.	11, 15, 87, 111
Rumsey v. Berry.....	33

S

Sandford, C. & L. T. Co. v.....	291
Sauer, U. S. v.	200

Saunders, Ogden v.	231
Schriber v. Rapp.	174
Schwinke, Western Star Lodge v.	260
Scollans v. Flynn.	51
Segar, Stoddard v.	125, 139, 141
Seidenbender v. Charles.	7, 15, 70, 120
Seney, Korten v.	11
Shaw, State v.	54, 189
Sheriff, Com. v.	70, 80
Sherwood, Old Colony Co. v.	161, 167
Sherwood, National In. Co. v.	168
Shobert, Ex Parte.	191
Shorts, State v.	7, 13, 15, 93, 109
Shotwell, Wooden v.	11, 15, 69, 117
Simonds, Com. v.	53
Simmons, U. S. v.	237
Slaughter House Cases.	235
Slenker, U. S. v.	242
Smelly, Monroe v.	7
Smetton, Taylor v.	15, 95, 96, 191
Smith, Alvord v.	21, 47, 48
Smith v. State.	11, 113
Smith, U. S. v.	222, 237, 242
Society, Delier v.	21
Solomon v. State.	11
Southern M. In. Co.	156
Spalding v. Vilas.	274
Springer v. U. S.	269
Squires v. Whisken.	51
Stallings, Branham v.	115
Stanley, Roddy v.	90
Staples, U. S. v.	230
State, Alexander v.	62
State, Allgeyer v.	294
State, Association v.	15, 76, 83
State, Bagley v.	51
State, Ballock v.	7, 15
State, Bamble v.	52
State, Bayland v.	11
State, Bell v.	11, 13, 42, 83, 85, 181, 186
State v. Boniel.	79
State v. Book.	59
State, Boyd v.	76
State v. Bryant.	78b
State, Buck v.	11
State, Buckalew v.	177, 179, 186
State, Chavanah v.	181, 191
State, Cheesum v.	51
State v. Clark.	11, 84
State, Debay v.	61
State, Dent v.	277
State, Dunn v.	70, 78a
State, Edwards v.	51
State, Eubanks v.	15, 42, 78
State, Fontenberry v.	34
State, France v.	13
State, Gamble v.	52
State v. Grimes.	187
State v. Gupton.	64
State, Hamilton v.	62

Table of Cases Cited.

xv

State, Holman v.	15, 80, 191
State, Hudelson v.	15, 83, 123, 134, 136
State, Huff v.	49
State, Johnson v.	51
State, Kohshorn v.	178
State v. Leighton	59
State, Loiseau v.	11, 13, 177
State, Long v.	7, 74, 110
State v. Lovell	102, 139, 143
State v. Lumsden	11, 13, 191
State v. Manser	59
State v. Moren	15, 184
State v. Mumford	15, 83, 89
State v. Overton	76
State, Palmer v.	49
State, Quarles v.	13
State, Portis v.	189
State, Randall v.	7, 15, 77
State, Reeves v.	186
State v. Shaw	54, 189
State, Shorts v.	7, 13, 15, 93
State, Smith v.	11, 113
State, Solomon v.	11
State, Stone v.	305, 306
State, Thomas v.	15, 69, 191
State, Ward v.	59
State, Walker v.	59
State v. Willis	15
State, Wortham v.	63
State, Yellowstone Kit v.	15, 118, 186
Statesby v. U. S.	265
St. Croix Mfg. Co., Dunham v.	136, 137
St. John Baptist Church, Dion v.	175b
Steele, Lawton v.	299
Stickle, U. S. v.	231
Stimpson, Railroad v.	266, 230
Stoddard v. Segar	125, 139, 141
Stokes, Kendall v.	256, 267, 268, 274
Stokes v. U. S.	220
Stone v. New York	299
Stone v. State	305, 306
Strader, Tatman v.	51, 55
Streep v. U. S.	200, 224
Swaine, Bussell v.	116
Swearingen, U. S. v.	242, 243
Swigert v. People	52
Swinke, Western Star Lodge v.	260
Sykes v. Beadon	164, 165, 175, 191
Sykes, Gilbert v.	65

T

Tatman v. Strader	51, 55
Taylor, Bernard v.	65
Taylor, Com. v.	59
Taylor v. Smetton	15, 95, 96, 191
Teal v. Felton	274, 286
Thomas v. State, ...	15, 69, 98, 191
Thomas, Tollett v.	51, 53, 101, 102, 139, 143
Thompson, Boardman v.	283
Thompson, Gaines v.	265

Thornhill v. Orear	183
Tilton, Com. v.	51
Tollett v. Thomas	51, 53, 101, 102, 139, 143
Tontine Sav. Ass'n	103, 150, 151
Tousley, Wilkinson v.	51
Trimble v. Hill	20
Tuolumne Water Co., Turner v.	66
Turner v. Water Co.	66

U

Underwood, Ridgeway v.	123
Union In. Ass'n v. Lutz	147, 174
Union R. L. R. Co., Noble v.	265
U. S. v. Andrews	244
U. S. v. Baskets Champagne	281
U. S. v. Beach	224
U. S. v. Beatty	19, 223
U. S., Bennett v.	242
U. S. v. Black	276
U. S. v. Boyle	237
U. S., Brand v.	216, 228
U. S. v. Brown	238
U. S. v. Burnell	237
U. S., Cheatham v.	279
U. S. v. Chesman	242
U. S., Choe Chan Ping v.	277, 281
U. S. v. Clark	242, 244
U. S. v. Commissioners	254
U. S. v. Davis	137
U. S. v. Dodge	240
U. S., Dunlop v.	245
U. S., Durland v.	202
U. S., Earnshaw v.	282
U. S., Elkin v.	280
U. S. v. Elliott	237
U. S. v. Fay	205, 206
U. S. v. Ferreira	261, 262
U. S. v. Finney	229
U. S., Fong Yue Ting v.	281
U. S. v. Fulkerson	7, 172
U. S. v. Gee	239
U. S., Grimm v.	244
U. S. v. Guthrie	268
U. S. v. Haeflinger	219
U. S., Harlen v.	56
U. S. v. Harman	242, 253
U. S., Haynes v.	218
U. S., Horner v.	7, 11, 15, 70, 73, 170, 175, 191, 192, 249, 253
U. S. v. Jarvis	244
U. S. v. Jones	200, 214
U. S. v. Jung Ah Lung	280
U. S. v. Knox	272
U. S. v. Lamar	275
U. S. v. Lamkin	245
U. S., Lansburg v.	110
U. S. v. Ling	244
U. S. v. Loring	209
U. S. v. McDonald	44, 161, 166, 170
U. S. v. Martin	244, 245

Table of Cases Cited.

xvii

U. S. v. Mitchell	216
U. S. v. Nathan	244
U. S., Olney v.	15, 114, 123, 184, 237
U. S. v. Owens	217
U. S., Passavant v.	269, 282
U. S. v. Politzer	190
U. S. v. Reid.	206, 207
U. S., Rosen v.	246
U. S. v. Sauer	200
U. S. v. Simmons	237
U. S. v. Slenker	242
U. S. v. Smith	222, 237, 242
U. S., Springer v.	269
U. S. v. Staples	230
U. S., Statesby v.	265
U. S. v. Stickle	231
U. S., Stokes v.	220
U. S., Streep v.	200, 224
U. S., Swearingen v.	242, 243
U. S., Ting v.	281
U. S. v. Wallis	7, 73, 88, 172
U. S., Ware v.	273
U. S. v. Warner	243
U. S., Watson v.	227
U. S., Weiber v.	221
U. S. v. Wightman	243
U. S. v. Wilson	244
U. S. v. Windom.	278
U. S. v. Wooten	213
U. S. v. Zeisler	83

V

Vilas Spalding v.	274
Virginia, Phalen v.	305

W

Wahl, Ex Parte	244
Walker v. State	59
Wallace, Lucas v.	107
Wallingford v. M. Soc.	165
Wallis, U. S. v.	7, 72, 88, 172
Ward v. State	59
Ware v. U. S.	273
Warner, U. S. v.	244
Washington Glass Co. v. Mossbaugh.	124
Watson, U. S. v.	227
Weiber v. U. S.	221
Weithoff, People v.	51
Western Star Lodge v. Schwinke	260
Whitely, Commissioner v.	271, 313
Whisken, Squires v.	51
White, Harris v.	21, 145
Wightman, U. S. v.	243
Wilkes v. Dinsman ..	254
Wilkinson v. Gill	7, 111
Wilkinson v. Tousley.	51

Willis, State v.	15, 111
Wilson v. Pearson	199
Wilson, U. S. v.	244
Windom, U. S. v.	278
Wood, Holt v.	108
Wooden v. Shotwell	11, 15, 69, 117
Wooten, U. S. v.	213
Wortham v. State	63
Wright, Com. v.	182, 191
Yellowstone Kit v. State.....	15, 118, 186
Wick Wo v. Hopkins	280

Z

Zumstein, Association v.	287, 288, 291
Ziebold, Kansas v.	301
Zeisler, U. S. v.	83

LOTTERIES IN THE MAILS.

CHAPTER I.

This chapter will embrace a historical sketch of lotteries in the United States and Europe together with the Anti Lottery Laws of Congress now in force.

Section 1. The lottery, as a method of gambling, has prevailed from the remotest antiquity. It is not intended, however, at this time, to give even a general history of the lottery, but it will be sufficient for the purpose in view in this work to note, briefly, the evolution of the law of lotteries in modern times. Prior to the last decade of the Seventeenth Century, lotteries, public or private, were, it seems, not condemned by law anywhere and the people operated them at pleasure, without let or hindrance, unless it was, in some countries, to obtain a license therefor.

Sec. 2. The first lottery, authorized by law in England, was established in 1567 and in 1569 there were only three lottery offices in the kingdom. A lottery to aid in the colonization of Virginia was authorized in 1612 in the reign of James I. Nothing probably shows the advance in public opinion on this method of gambling in the last three hundred years more than the fact that the first lottery, sanctioned by law in England, was drawn at the west door of St. Paul's Cathedral in London. But opposition to lottery gambling at last came in some degree and the Statute of 10 and 11 William III, C. 17, reciting that persons had fraudulently obtained large sums of money from the unwary by color of patents or grants under the Great Seal, licensing lotteries,

provided that all lotteries should thereafter be held as common nuisances and all patents and grants for the same should be void and denounced penalties upon those who set up or operated lottery schemes. The effect of this Statute was however, simply to deprive the king of the right to issue letters patent for lotteries, but the parliament, of course, possessed the power to authorize lotteries, either public or private.

Genoa was the first of the nations to introduce the lottery as a source of revenue. France resorted to it for that purpose about the year 1580. An English Chancellor proposed the lottery for a long series of years as a justifiable measure of finance, on the principle of its being a voluntary tax, assumed by the adventurers. Ex-President Jefferson, in his memorial to the Virginia Legislature in 1826, stated that money, invested in a lottery, was a voluntary tax and Chancellor Kent, in 1839, thought the lottery was "a fair way to reach the pockets of misers and persons disposed to dissipate their funds." England, from 1709 to 1824, following the theory of her Chancellor of the Exchequer, alluded to above, established and maintained lotteries by law to raise revenue and, from 1793 to 1824, the government realized an average yearly profit of £346,765 by this method. The tickets were sold to contractors, who resold them at retail by "Morocco men" who traveled through the country. These state lotteries, conducted often fraudulently by the contractors, operated perniciously upon the morality of society and public opinion soon revolted against them. In 1808, the House of Commons appointed a committee to examine into the subject. While the report of this committee conclusively showed that lottery gambling was very extensive and very pernicious, the revenue obtained by the government was too great a temptation to be long resisted and the State lottery was continued. In 1819, the question arose again and through the efforts of Lyttleton, Buxton, Wilberforce, Canning and Castlereagh, measures were adopted to suppress the state lottery, the last drawing in which occurred in October, 1826. By a blunder

in legislation, however, authority was given by the Act 1 and 2, Will. IV, Ch. 8, to hold a lottery for the improvement of the city of Glasgow, but these "Glasgow Lotteries," as they were called, were abolished by the Act 4 and 5, Will IV, Ch. 37.

But owing to the supposed good effects of encouraging art, what were known as "Art Unions" were exempted from penalties by 9 and 10 Vic. C. 48, and in consequence of these exemptions the evil of lottery gambling has been renewed in another form and gift concerts, Art Unions, etc., still exert a baleful influence on public morals in England.

"In the Italian republics of the 16th Century, the lottery principle was applied to encourage the sale of merchandise." Charles Knight, in his history of England, says that in 1710 the newspapers were "full of the most curious advertisements. The projectors of schemes to make all men suddenly rich—the managers of fraudulent insurances—the sellers of state jewelry by lottery—all these and many others, who trafficed in human credulity, were exceptions to the general spirit of the English Tradesmen."

Francis I granted the first letters patent for a lottery in France, and in 1656, Tonti (the originator of Tontines) opened a lottery for the building of a bridge between the Louvre and the Foubourg St. Germain. It was said France raised enough money by lotteries to defray the expenses of the war of the Spanish Succession. Lotteries were established in France, also, for the benefit of religious communities and for charity purposes. All these were practically merged in the *Lotterie Royale* by the famous decree of 1776, which suppressed private lotteries. These lotteries had a demoralizing influence on French society, and in 1836, France enacted a general law prohibiting all lotteries. The other countries of continental Europe also suppressed private lotteries, but in Germany, Austria, Spain, Holland, Italy and Denmark the State lottery still appears as a powerful and reliable means of revenue.

What are denominated lottery bonds, the nature of which will be hereafter examined fully, were formerly resorted to by

the nations above named and are yet by all except France, England and Italy. The Societe du Foncier, the city of Paris and many of the municipal governments of Europe have authority now to negotiate and do negotiate such bonds. Mr. Henri Levy-Ullmann, in an article in the 9th Vol. of the Harvard Law Review, 392, says that these "lottery bonds are popular with the public which is greedy for all transactions of chance; the greater the chance the greater the number of speculators."

Sec. 3. The history of lotteries in the United States is substantially the same as that in England. Many of the colonies, prior to the Revolutionary War, passed laws forbidding private lotteries, but as was done in England, many lotteries were established by law. The State of New York, in 1721, prohibited all lotteries not licensed by the Government. In 1783, another act to the same effect, though more stringent, was passed, forbidding private lotteries and gave the State a monopoly of the business. From that time to 1821 no less than forty-four acts were passed establishing lotteries for raising public revenues. Under these acts money was raised for opening and improving roads, for improving the navigation of the Hudson river, for Orphan asylums, boards of health, and lotteries were favorite means, also, for raising money for educational purposes. This mixture of morals and lotteries and the elevation of one by means of the other continued in New York until the adoption of the Constitution of 1821 which contained the provision that "no lotteries shall hereafter be authorized in this State."

Notwithstanding public opinion seems to have been crystalizing, during the first quarter of the present century, for the overthrow and suppression of all lotteries in this country as well as in England, Mr. Tyson, in his work on lotteries in the United States says that "in 1833 there were 420 schemes operated by 200 offices in Philadelphia." These offered prizes to the amount of \$53,136.930; seventy-three of these were in New York, sixty-five in Virginia, eighty-one in Connecticut, sixty-two in Rhode Island, thirty-four in Delaware and North

Carolina (joint grants), seventeen in Maryland, twenty-nine in Delaware, etc., etc. These were all illegal except twenty-six operated by the Union Canal Company, and Mr. Jefferson, in his memorial to the Virginia Legislature, gives the names of seventy acts of the legislature of that State prior to 1820, authorizing lotteries for all sorts of purposes.

The first attempts to suppress lotteries in most of the States were by legislation simply, but it was found, however, that laws forbidding lotteries that could be repealed, or that did not bind subsequent legislatures, were not effective, and at this time all the States have adopted constitutional provisions prohibiting the licensing or authorization of lotteries. The last great struggle with the lottery monster was between the state of Louisiana and the Louisiana Lottery Company, but the moral sentiment of the State triumphed over this great vice and in 1893 the charter of that company expired and it was forced to quit business. Lotteries, in that State, are now prohibited by a constitutional provision.

While the opposition to lottery gambling was later taking form in the United States than in England the work finally accomplished here was decidedly more thorough than there, for the constitutional provisions of the States and the legislation of Congress have been so construed as to bring "Gift Concerts" and "Art Unions" within them.

It must not be supposed, however, that constitutions and laws could kill either the gambling spirit or gambling habit; all they could do or have done is to suppress gambling under the name of lottery. The avowed lotteries under the operation of these constitutions and laws have disappeared but gift enterprises under various alluring names and disguises flourish even to-day not only in the large cities but also in the smaller towns and hamlets throughout our country.

On the suppression of avowed lotteries in the United States, that species of gambling, at once, increased enormously in Old Mexico and Hondurours. Indeed the Louisiana Lottery was transplanted to Honduras and under another name (The Hondurours Lottery) has done and is probably doing a large

business now in this country. Lottery gambling was extensive in Cuba when our Government took possession but it has been suppressed as far as it is practicable to suppress it by law.

Sec. 4. On the first day of November, 1775, the American Congress adopted the following resolution: "Resolved, That a sum of money be raised by way of lottery for defraying the expense of the next campaign, the lottery to be drawn in Phila." 1 Jour., Am. Con. 535. November, 1776, the Congress declared, by resolution, the scheme of the same lottery to be that 100,000 tickets should be issued and that the prizes to be drawn should amount in the aggregate to \$50,000,000; and the Government was to get fifteen per cent of the money raised by the sale of tickets. The managers of the lottery were selected November 20, 1776. The proceedings of Congress show further action in regard to this lottery from 1778 to 1786, but it is probable the scheme did not work satisfactorily or beneficially, for after 1786 nothing more is heard of it.

As an inducement to negotiate the loan of \$800,000, authorized by the Colonial Congress, of September 26, 1779, in addition to the four per cent interest which was to be paid, it was agreed to distribute among the subscribers, by lot, "obligations" of the United States for \$276,000, as a bonus or premium on the loan; and as an additional inducement, "gratifications" amounting to from five or six per cent were to be paid at the time of redemption, to the holders of the original certificates. The certificates for this loan were identical, in principle, with the lottery or premium bonds negotiated by European governments and cities.

Two lotteries authorized by the State of Maryland in November, 1795, for the purpose of raising \$52,500, were legalized by Congress, in the District of Columbia, by Act of May 6, 1812 (2 Stat. L. 728).

Congress does not seem to have authorized any other lottery scheme until 1812, when, in providing for the municipal government of Washington City, authority was given that city

to operate a lottery scheme for the improvement of its streets, etc. (2 Stat. L. 720-6).

By the Act of Congress of May 15, 1820, providing for the government of Washington City, all acts in relation to lotteries, then in existence, were repealed but authority was given by that act to the city to operate a lottery for ten years for public purposes. This authority, not having been in the meantime renewed, expired by limitation May 15, 1830.

The Act of Congress of February 22, 1827 (4 Stat. L. 105), authorized the City of Washington to include lands of Thomas Jefferson in its lottery schemes.

This terminated the affirmative legislation of the Federal Government in favor of lotteries though Congress for a long time after 1827 taxed lottery schemes, operated under State authority.

In the article, "Lotteries," by Dr. W. C. Smith, in the *Encyclopaedia Britannica*, it is stated, "before 1820 at least seventy acts were passed by Congress authorizing lotteries for various public purposes, such as schools, roads, etc., about eighty-five per cent of the subscription being returned in prizes." This is manifestly an error. Dr. Smith, in his statement, was evidently relying on Mr. Jefferson's memorial to the Virginia Legislature in 1826, praying for authority to establish a lottery for the sale of his property, in which he says that from 1782 to 1820 no less than seventy acts were passed "by the Legislature" authorizing lotteries for various purposes. Mr. Jefferson meant the Legislature of Virginia, while Dr. Smith must have thought he meant the National Legislature and hence, his mistake, which was natural enough for one not familiar with our dual system of Government.

The war waged on lotteries during the first quarter of the present century had the effect, not only, to prevent affirmative legislation in their favor but to encourage legislation by Congress forbidding them.

Sec. 5. The first act of Congress *against* lotteries was that of March 2, 1827 (4 Stat. L. 238), section 6 of which provided: "That no postmaster or assistant postmaster shall act as agent

for lottery offices or under any color of purchase, or otherwise, send lottery tickets; nor shall any postmaster receive free of postage or frank lottery schemes, circulars or tickets."

The vending of lottery tickets, in the District of Columbia, was prohibited by Act of August 31, 1842, except such as had been authorized by the City of Alexandria for one year. (5 Stat. L. 578).

The next act, in its order, was that of July 27, 1868, section 13 of which provided: "That it shall not be lawful to deposit in a postoffice, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts or similar enterprises, offering prizes of any kind on any pretext whatever." (15 Stat. L. 194-196.) This act was found to be a dead letter, because no provision was made for enforcing it, and more radical measures were adopted by the Act of June 8, 1872 (17 Stat. L. 283). Section 149, of that act, which is now section 3894, Revised Statutes, made it unlawful to convey by mail or to deposit in a postoffice to be sent by mail, any letters or circulars concerning *illegal* lotteries, so-called gift concerts, or other similar enterprises.

Section 300, which is now sections 3929 and 4041, Revised Statutes, authorized the Postmaster-General to issue a fraud order against anyone found by him to be conducting through the mails "any fraudulent lottery, gift-enterprise, or scheme for the distribution of money or any real or personal property, by lot, chance or drawing of any kind."

By the act of July 12, 1876 (19 Stat. L. 90), the word "illegal" was stricken out of section 149 (section 3894, R. S.), but the word "fraudulent" still remained in section 300 (sections 3929 and 4041, R. S.) and in construing these laws Attorney-General McVeagh, on April 27, 1881 (17 Op. Atty. Gen. 77), held that the Postmaster-General must find, before he could issue a fraud order against a lottery promoter, that the person, against whom it was to operate, was conducting through the mails a *fraudulent* lottery scheme but when he found that fact, he could issue the order, though the scheme was operated by state authority. And he further

held that a newspaper, containing a lottery advertisement, was not thereby rendered non-mailable by the law then in force.

By the Act of September 19, 1890 (26 Stat. L. 465) the law was so amended as to include newspapers, and the words "*offering prizes dependent upon lot or chance*" were inserted after "enterprise" therein, and the word "fraudulent" was stricken out of sections 3929 and 4041.

Under all these laws the department uniformly held that an ordinary letter or packet, under seal, must be delivered according to the directions thereon, though the addressees were known to be conducting lotteries or fraudulent schemes. There are not now and never have been any restrictions upon the operators of these schemes in the *sending* of mail matter by them, and they could always reach the people through the mails; and the result was that they had money remitted to them by express orders or bank checks in ordinary letters, under seal, and they continued to run their schemes wide open, though orders stood against them forbidding the delivery of registered letters and the payment of money orders to them.

To remedy this manifestly weak point in the law, the Act of March 2, 1895, was enacted (Acts 1894-95, 963), by which the power of the Postmaster-General relating to *registered* letters was extended to *ordinary* mail matter under seal.

LAWS OF CONGRESS AS THEY STAND AT PRESENT.

Sec. 6. Sections 3894, 3929 and 4041, R. S. of the United States, as amended by the Statute of September 19, 1890, Ch. 908, are as follows:

Sec. 3894. "No letter, postal card, or circular concerning any lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money by false pretenses, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note, or

money order, for the purchase of any ticket, tickets, or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any postoffice or branch thereof, or by any letter-carrier; nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any lists of prizes awarded at the drawing of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or be delivered by any postmaster or letter-carrier. Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than \$500 or by imprisonment for not more than one year, or by both such fine and imprisonment for each offense. Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed.

Sec. 3929. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any postoffice at which registered letters arrive directed to any such person or company, or to the agent or representative of any such person or com-

pany, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such registered letters to the postmaster at the postoffice at which they were originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster-General may prescribe. But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by registered letters to any other person, firm, bank, corporation, or association named therein, shall be held to be *prima facie* evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

Sec. 4041. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders. But this shall not authorize any person to open any letter not addressed to himself. The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme, or device, that remittances for the same

may be made by means of postal money orders to any other person, firm, bank, corporation or association named therein shall be held to be *prima facie* evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way."

The first section of the act of Congress of March 2, 1895 (Acts 1894-5, page 963), made it a criminal offense for any one to "cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited or carried by the mails of the United States, or carried from one State to another in the United States, any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought in the United States, or deposited in or carried by the mails of the United States, or transferred from one State to another?"

And the fourth section of the same act provides: "That the powers conferred upon the Postmaster-General by the statute of eighteen hundred and ninety, chapter nine hundred and eight, section two, are hereby extended and made applicable to all letters or other matters sent by mail."

CHAPTER II.

The discussion in this chapter will embrace the definition and, under that head, the essential and non-essential elements of a lottery scheme. The subject of "Prizes dependent upon lot or chance" will also be fully examined in the light of gambling transactions other than lotteries.

THE DEFINITION OF LOTTERY.

Sec. 7. Before proceeding to the discussion of this subject, the general rules, which have been applied by the courts in the interpretation of lottery schemes, will be briefly noticed.

In the American and English Encyclopaedia of Law, Vol. 13, p. 1178, this general statement is to be found:

"Many ingenious devices have been resorted to in attempting to evade the laws for the suppression of lottery schemes. The courts, however, have generally construed the purposes and results of these subterfuges with much strictness, and in almost every case they have been held to be in violation of the terms and meaning of those statutes for the prevention of lottery practices."

In *U. S. vs. Wallis*, 58 Fed. Rep. 942, the court said:

"The statute is directed against the use of the mails for the conveyance of any advertisement of 'any lottery or gift enterprise of any kind.' This language is sufficiently comprehensive to include any scheme in the nature of a lottery. * * * It may be sufficient to say that this embraces the elements of procuring through lot or chance, by the investment of a sum of money or something of value, some greater amount of money or thing of greater value. When such are the chief features of any scheme, whatever it may be chris-

tened or however it may be guarded or concealed by cunningly devised conditions or screens, it is under the law a lottery."

In *Randall vs. State*, 42 Texas, 585, the court remarked that "Courts will not inquire into the name but determine the character of the transaction or business in which parties are engaged."

It was said in *Long vs. State* (74 Md. 565-572) to be a valid exercise of power in a State to protect the morals and advance the welfare of the people by prohibiting every scheme and device bearing any semblance to lottery or gambling.

The Supreme Court of the United States in the *Horner* case, 147 U. S. 449, expressly gave its assent to the statement made in *Commonwealth vs. The Sheriff*, 10 Phila. Rep. 203, to the effect that whatever amounted to a distribution of prizes by lot was a lottery no matter how ingeniously the object of it might be concealed. And the same court quoted, with approval, the following language of the Maryland Court of Appeals in *Ballock vs. State*, 73 Md. 1:

"Our statute does not justify a court expressly directed to so construe the law as to prevent every possible evasion, whether designedly or accidentally adopted, in deciding a thing is not a lottery simply * * * because it lacks some element of a lottery according to some particular dictionary's definition of one, when it has all the other elements, with all the pernicious tendencies, which the State is seeking to prevent."

"The courts have uniformly looked beyond the mere form or device of the transaction and sought out and suppressed the substance itself." *Wilkinson vs. Gill*, 74 N. Y. 73.

"When such are the chief features of any scheme, whatever it may be christened or however it may be guarded or concealed by cunningly devised conditions or screens, it is, under the law, a lottery." *U. S. vs. Fullerton*, 74 Fed. Rep. 619. "But the law regards not mere semblance but the substance of things, and consequently these devices, however ingenious, can not be successful." *State vs. Shorts et al.*, 3 Vroom, 398.

Justice Gibson, in meeting the contention in the case of *Seidenbender vs. Charles*, 4 Sergeant and Rawle, 151 (8 Am. Dec. (loc. cit.) 688), that the act of the Province of Pennsylvania of 1762, which declared all lotteries to be public nuisances, applied only to lotteries concerning personal property and not to land lotteries, used this language: "I grant the legislature may not have had this particular kind of lottery in view; but was it intended to restrain the operation to those particular kinds of lotteries then in use, and to those only? I apprehend not. It is very clear that a particular kind of mischief, differing not in form or substance, but in degree only, from the one under consideration, and only less pernicious in its consequences, first induced the legislature to act on the subject. Shall the letter, which is sufficiently comprehensive to embrace this case, be restrained to the particular mischief then existing, and exclude one of the very same stamp, merely because it was not then practiced? This surely would not be a sound construction."

Judge Bell expresses the same thought in *Monroe vs. Smelly*, 25 Texas Rep. 586 (78 Am. Reps. 541). In discussing the question of what is a wager at common law and the exceptions to the general rule Judge Bell said:

"And it is perhaps the greatest glory of the common law that it is, in its truest sense, both conservative and progressive in its tendencies. The exceptions to the general rule of the common law on the subject of wagers fall into two classes: One class is based upon a concern for the interest of the public; the other is based upon a concern for the interests and feelings of individuals. In a merely political sense, a thing may be said to be contrary to public policy in one generation, * * * which is not so in the next. And when the law institutes an inquiry into the morality or immorality of a particular thing, the inquiry does not proceed upon abstract principles so much as upon the received and common opinion of the great body of the people, constituting the political community, upon which the law has its operation. So a thing, in contemplation of law, may be immoral to-day which was not immoral

fifty years ago. That may be held to be in strict conformity with sound morals, according to the public sense of the present day, which would have been condemned as immoral during the ascendancy of the Puritans in England, and of the Covenanters in Scotland."

Sec. 8. Guided by these general rules for the interpretation of a lottery scheme, we will now proceed to inquire into the nature of such a scheme and ascertain and state as near as may be a definition of it, and especially a definition of it as used in the Anti-Lottery Act of Congress of September 19, 1890.

Sec. 9. While it appears the Anti-Lottery Act of September 19, 1890 is not artistically or scientifically drawn and while we find the words "so called *gift concert*" in one portion of the act, and "gift enterprise" and "*gift enterprise of any kind*" in other portions of the same act, and in two places we find the words "offering prizes dependent upon lot or chance" and in other places the phrase "the distribution of money or of any real or personal property by lot or chance or drawing of any kind," yet it is thought it may be safely assumed, taking the whole act together, that these different expressions are used interchangeably and that the words "so-called gift concert," "gift enterprise" and "gift enterprise of any kind" mean the same thing and that in them is included every scheme where prizes, dependent upon chance, are offered, in the guise of gifts or donations, in connection with some enterprise or business, either legitimate or illegitimate, and it will be assumed that the phrases, "offering prizes dependent upon lot or chance" and "the distribution of money or of any real or personal property by lot, chance or drawing of any kind" mean the same thing; and the phrase "offering prizes dependent upon lot or chance" will be alone used hereafter as embodying the whole meaning of the other phrase.

Sec. 10. In the American and English Encyclopaedia of Law, it is stated that, "A lottery is a sort of gaming contract, by which for a valuable consideration, one may, by favor

of the lot, obtain a prize of a value, superior to the amount or value of that which he risks."

Mr. Bishop in his *Work on Statutory Crimes* (sec. 952), defines a lottery to be, "Any scheme whereby one, in paying money or other valuable thing to another, becomes entitled to receive from him such return in value or nothing as some formula of chance may determine."

Sec. 11. The following definitions of "lottery" have been given by the courts:

"Lottery, in its popular acceptance, is a distribution of prizes by lot or chance; and when the chances are sold and the distribution of prizes determined by lot, this constitutes a lottery." *Buck vs. State*, 62 Ala. 434; *Solomon vs. State*, Id. 83.

"The generally accepted definition of a lottery is that it is a scheme for the distribution of prizes for the obtaining of money or goods by chance." *People vs. Noelke*, 94 N. Y. 137.

"Any device, whereby money or any other thing is to be paid or delivered on the happening of any event or contingency in the nature of a lottery, is a lottery ticket." *Smith vs. State*, 68 Md. 170; *Bayland vs. State*, 69 Md. 170.

"A lottery is a scheme, device or game of hazard whereby, for a smaller sum of money, or other thing of value, the person dealing therein, by chance or hazard or contingency, may or may not get money or other thing of value, of greater or less value, or in some cases of no value at all, from the owners or managers of such lottery." *State vs. Lumsden*, 89 N. C. 572.

"Whatever may be the name or character of the machine or scheme, if in its use a consideration is paid and there is gambling, the hazarding of small amounts to win larger, the result of winning or losing to be determined by chance in which neither the will nor skill of man co-operates to influence the result, it is a determination by lot." *Loiseau vs. State*, 22 So. Rep. 138.

Attorney-General Harmon, in his opinion given the Postmaster General, in February, 1896, 21 Op. Att'y Gen. 313, furnishes an excellent definition of lottery as follows: "But the name 'lottery,' which originally implied casting of lots, now covers any determination of gain or loss by the issue of an event which is merely contrived for the occasion."

"A lottery is a scheme by which some result is reached, by some action or means taken, and in which result man's choice or will has no part, nor can human reason, foresight, sagacity or design enable him to know or determine such result until the same has been accomplished."

People v. Elliott (Mich.), 3 Law. Rep. Ann. (loc. cit.) 405.

"A lottery is a game of hazard in which small sums are ventured for the chance of obtaining a greater." Bell vs. State, 5 Sneed, 507.

"A contrivance for the distribution of prizes by chance; a reliance upon the result of hazard; a decision of the adventurer's investment of the favors of fortune is a lottery." Wooden vs. Shotwell, 23 N. J. L. 465; 24 Id. 789.

"Where a valuable consideration is paid and it is determined by lot or chance, according to some scheme held out to the public, what the party who paid the money is to have for it or whether he is to have anything, it is a lottery." State vs. Clark, 33 N. H. 335; Hull vs. Ruggles, 56 N. Y. 427.

The Supreme Court of the United States, in the Horner case, 147 U. S. 449, in passing upon what is a lottery, said:

"In the Century Dictionary under the word lottery is the following definition: 'A scheme for raising money by selling chances to share in a distribution of prizes; more specifically, a scheme for the distribution of prizes by chance among persons purchasing tickets, the corresponding numbered slips or lots, representing prizes or blanks, being drawn from a wheel on a day previously announced in connection with the scheme of intended prizes. In law the term lottery embraces all schemes for the distribution of prizes by chance, such as policy playing, gift exhibitions, prize concerts, raffles at fairs, etc.,

and includes various forms of gambling.' * * * In Webster's Dictionary 'lottery' is defined as 'A distribution of prizes by lot or chance.' In Worcester's Dictionary it is defined as 'A distribution of prizes and blanks by chance; a game of hazard, in which small sums are ventured for the chance of obtaining a larger value, either in money or in other articles.' * * * In the Imperial Dictionary the word is defined thus, 'Allotment or distribution of anything by fate or chance; a procedure or scheme for the distribution of prizes by lot; the drawing of lots. In general lotteries consist of a certain number of tickets drawn at the same time, some of which entitle the holders to prizes, while the rest are blanks.' "

In *Korten vs. Seney*, 68 N. W. Rep. 824. the Supreme Court of Iowa said: "Both upon reason and authority, a lottery is a game—a game of chance. Bish. Stat. Crimes, Sec. 952; 8 Am. and Eng. Ency. Law, 993, and authorities cited. * * * It is said that money so paid for tickets is not laid, staked or bet. One of the definitions of the word 'lay' is 'to risk.' Money paid for lottery tickets is risked on the chances of success at the drawing. To stake money is to put it at hazard on the issue of competition or upon a future contingency. Money paid for lottery tickets is staked in a game of chance." In this case the raffle never came off, but the court held that that made no difference, remarking that "the notes were as void before the time the lottery was to take place as they would have been afterwards."

Sec. 12. These definitions, given by the courts, text writers and lexicographers, fail to make the meaning of lottery clear and unambiguous. These definitions, in their last analysis, are tantamount to the statement that a lottery is a scheme in which the promoter, for a valuable consideration, distributes prizes to the adventurers by lot or chance, and this adds but little to mark the limitations and fix the scope of the words of the Anti-Lottery Act of Congress, "any lottery, so-called gift concert or similar enterprise offering prizes dependent upon lot or chance."

The courts and text writers have contented themselves with treating the subject as a whole and hence there has been no philosophical discussion or investigation of the separate elements necessary to constitute a lottery scheme. This is attributable, in a large degree, to the fact that, until within the last few years, there have existed in this and other countries authorized lotteries and even now such lotteries exist in many countries and hence few questions involving the essential elements of a lottery scheme have been pressed before the courts. But now that all lotteries and similar enterprises in the United States have been made illegal and void by the constitutions of the several States and by Federal Statutes, the gamblers have lately sought and will in the future continue to seek to evade these constitutions and statutes by ingenious devices and subterfuges under alluring and misleading names so that those who are clothed with authority and jurisdiction to enforce the law will be called upon, indeed have been already to a limited extent called upon, to examine more critically into the nature and necessary elements of a lottery scheme or similar enterprise than in former years; and hence it is deemed best, in this work, to treat the essential elements of such a scheme or enterprise separately and as far as practicable ascertain and state the limitations, scope and meaning of such elements. These elements are: 1, A wager; 2, a valuable consideration; 3, a prize, and, 4, lot or chance, and the investigation of these elements separately will be made in the order thus given.

A WAGER.

Sec. 13. A lottery scheme necessarily involves the element of a wager.

A lottery is called "a game of hazard" in Worcester's Dictionary, in *Ree's Cyclopaedia*, in *Bell vs. State*, 5 Sneed (Tenn.), 507, in *France vs. State*, 6 Baxter (Tenn.), 478, and in *State vs. Lumsden*, 89 N.C. 572; "A sort of gambling contest," in the *American and English Encyclopaedia of Law*; "A gambling by lot," in *Loiseau vs. The State*, 22 So. Rep. 138; and "a game of chance" in *State vs. Shorts*, 3 Vroom, 398.

In fact this proposition is so well settled that it would be a waste of time to review the authorities in support of it. It is of the utmost importance, however, to keep in mind this important element of a lottery because, in many cases, as will appear later on, it will be found it is the element by which alone a lottery scheme can be distinguished from a legitimate business transaction.

A wager is defined to be a "contract by which two or more parties agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening of an uncertain event." Black's Law Dictionary, Title "Wager;" 2 Bouvier's Dictionary, Title, "Wager."

"A wager is something hazarded on the issue of some uncertain event; a bet is a wager." *Quarles vs. State*, 5 Humph. 561.

The true nature of a wager will be fully examined when we come to treat of the subject of "Prizes dependent upon lot or chance" and it is not deemed necessary to devote more space to it at this point.

THE CONSIDERATION.

Sec. 14. The consideration for the offer of prizes dependent on lot or chance must be a valuable one. Ordinarily there is little difficulty in determining what is a valuable consideration in its application to the common business transactions of the people, but there has been considerable discussion and some contrariety of opinion in the courts in its application to lottery schemes. In regular lotteries, where tickets are sold and nothing else is sold or given in connection with them, there is no question about the consideration being valuable. But in many schemes some articles of property and a chance in a lottery are sold in connection with each other. In that case, it was for a long time strenuously contended that there was no consideration for the chance, especially where the articles were sold at their regular retail prices. This contention, however, has been held untenable by all the courts so long and so often

that the question may be deemed settled and at rest. It is universally held, now, that the adventurer buys and pays for both the article and the chance in the lottery, and hence a valuable consideration for the chance exists. The same idea is expressed by some of the courts by the statement that the offer of prizes acts as an inducement to purchasers to buy the articles.

Sec. 15 There is another class of cases where no money or property is directly asked or given, but where the promoters offer chances for prizes to adventurers who are required to do some act or perform some service which the promoter hopes and expects will result in the increase of the profits of his business and which will, therefore, indirectly benefit him financially. The Postoffice Department has been called upon for several years past to decide whether there existed a valuable consideration or not in this class of business enterprises. One party, without charge, distributed promiscuously to the people, numbered cards on which it was stated that he would, at certain times, place in his show windows many full suits of clothes having numbered labels on them and the parties holding cards with numbers corresponding with the numbers on the suits of clothes should have the clothes. Another party advertised that any one calling at his place of business, whether he bought anything or not, would receive a numbered coupon entitling him to a chance for a prize he was offering. Others advertised that they had placed in their windows jars full of beans, peas, corn, shot, etc., and the one who would guess nearest to the number of beans, peas, shot or grains of corn in a jar would receive a prize. And, again, a party distributed numbered calendars to the people, generally, with the statement that some of the calendars would be redeemed at certain prices, the calendars redeemed to be designated by number. The Department held that there existed a valuable consideration for the chance of a prize in each of these schemes. In 1894, a lengthy opinion was given by the Author, the then Assistant Attorney-General for the Postoffice Department, on a scheme of this class presented by Edward F. Sweet, holding that there

existed a valuable consideration for the chances for prizes in his scheme, and excluding literature concerning it from the mails, whereupon Sweet instituted suit in the Circuit Court of the United States for the Northern District of Illinois, to compel, by mandatory injunction, the postmaster at Chicago to receive and transmit through the mails the advertisements of his plan of business. The Author prepared and submitted to the court an argument, on behalf of the postmaster, embodying substantially the positions he had assumed in his opinion. That argument is as follows:

The scheme set out in the petition is a lottery or similar enterprise offering prizes dependent on lot or chance, and the newspapers and calendars concerning it are nonmailable under the provisions of the lottery act of September 19, 1890. It is conceded that the prizes offered are dependent on lot or chance, but the complainant's contention is that the scheme is not a lottery, because there is no consideration paid for the chance of drawing a prize, and he relies on the cases of *Yellowstone Kit v. The State of Alabama* (7 L. R. A. 599) and *Cross et al v. The People* (32 Pac. Rep. 821), and the cases there cited, to support that contention.

In *Yellowstone Kit vs. The State of Alabama*, it appeared that eight prizes were to be distributed by lot among some 8,000 ticket holders. The tickets were distributed to the people without exacting anything whatever from them. However, on the day of the drawing the parties, issuing the tickets, held one of their customary performances, consisting of acrobatic contortions, etc., and between acts they sold medicines. These exhibitions were in a tent, which would seat between 900 and 1,000 people, and would afford standing room for about 2,500. For admission to the exhibitions a charge of 10 cents was made. But these tickets had no connection whatever with those entitling the holders to a chance for the eight prizes. These tickets had been distributed free to any and all persons present at his previous performances and for admission to these exhibitions no charge was made. The only fee charged was for the occupancy of a seat; there was

none for entrance. Nor was it necessary that the holder of a successful ticket should be present to get his prize in case he drew one. It would be delivered as well at the private residence of the winner by the party giving the exhibitions. In the application of the general principle announced by the court it was held that there was no valid consideration given for these tickets, and hence the scheme was not a lottery.

The judge delivering the opinion said: "The suspicion, even though well founded, that these presents may have been given away in order to induce a larger crowd to assemble at the defendant's performances with the expectation that they would buy medicines or pay a fee for occupying a seat in the tent would be too remote to constitute a legal consideration."

In the case of *Cross & Co. v. People* (supra), it appeared that Cross & Co. gave away pianos to advertise their shoe store in Denver, Colorado. Every customer and any other person registering at the store, or sending a postage stamp with a request for one, received a numbered card, which entitled the holder to a chance in a drawing for a piano. The Supreme Court of Colorado held that there was no consideration paid for the card, and hence the scheme was not a lottery. The court adds: "The fact that such a chance or card given away to induce persons to visit their store with the expectation that they might purchase goods, and thereby increase their trade, is a benefit too remote to constitute a consideration for chance."

I do not concur in the conclusion reached in these cases, nor do I think the cases cited by those courts support them. It seems to me there was in both a valuable consideration for the cards or tickets entitling the holders to chances in the drawings.

What is a valuable consideration? Mr. Chitty, in his work on contracts (11 Ed.), page 28, says: "The general rule as to the sufficiency of a consideration seems to be that it may arise either, first, by reason of a benefit resulting to the party promising or to a third person by the act of the promisee; or, secondly, by reason of the latter sustaining any loss or inconvenience or subjecting himself to any charge or obligation

however small the benefit, charge, or inconvenience may be.

"It is indeed necessary that the consideration should be of some slight value only, or even if it be such as *could be valuable* to the party promising.

"So as regards the extent of trouble or loss, or obligation which the *promisee* has taken upon himself, it is immaterial that the detriment or charge, thus assumed, is, in fact, of the most trifling description provided it be not utterly worthless in fact and in law."

In view of this definition, there was, in my opinion, a valuable consideration, for the tickets entitling the holder to a chance in a drawing of prizes, in the Yellowstone Kit case, both because the acrobat desired and intended to derive some benefit from the distribution of tickets among the people and because the holders of the tickets were put to some inconvenience, and performed some service at the request of the former. He induced the people to advertise his performances and his medicines, by which he derived a benefit, and they suffered inconvenience and performed some labor.

In the Colorado case the consideration is more apparent. Cross & Co. not only advertised their shoe store by the scheme adopted, but no one received a card entitling him to a chance in the piano drawing without it having cost him either money or labor. Every person buying a pair of shoes received a card. In that case there is no question that there was a consideration for it according to the universal authorities hereafter cited. Then again, every person who went to the store and registered his name received a card. This required labor. This might in some instances be very slight, but that makes no difference according to Mr. Chitty. He was put also to some inconvenience, and that constitutes a consideration. And again, every person who requested a card, sending postage, received one. Here we find not only labor performed (writing a request for a card), but also the payment of postage on his letter, and on the letter inclosing the card.

In the case now before the court the calendar offered for mailing on one page has this in print:

"Calendar No. 34349. Preserve this calendar. Watch the Daily and Sunday Times for your number. Read the Minneapolis Times. It is the leading morning newspaper of the Northwest. Read directions on my back and learn how to get it. \$5 to \$50 cash every day. The Times is delivered in any part of the city for the very small sum of ten cents per week, seven days. Single copies by newsboys, daily, two cents, Sunday, five cents. If you have got enough give this to your little girl, office boy, neighbor, hired man, clerk, or cook. All calendar holders have an even chance. See directions on back."

And on the reverse page are found the directions how to obtain these prizes in this language:

"\$5 to \$50 given away every day in cash presents by the Minneapolis Times. Directions: Preserve this calendar and watch the Times for your number. If on any day the number published in the Times of that morning agrees with the number in the upper left-hand corner of the face of this calendar you are entitled to the amount named therein.

"Providing, to secure it, you must bring or send this calendar to the Times office before 8 p. m. of the same day said lucky number is published. Presents offered on Sundays will be given the Monday following up to 12 o'clock noon. Call at counting room, or on the circulator, in room 211, second floor."

According to Mr. Chitty's definition, the accuracy of which is not disputed anywhere, I believe a valuable consideration appears in the case before the court, in two ways. The holder of a calendar sustains some inconvenience, either pays money to or performs labor for the operator of the scheme. In order to obtain a prize the holder of a calendar must preserve it and take or send it to the Times office. This is specifically stated in the terms of the offer of the prizes, and whether so stated or not it is evident no one could draw a prize unless he preserve and present the lucky calendar at the proper time and place. This requires some labor and inconvenience, and Mr. Chitty says: "It is immaterial that the detriment or charge thus assumed is, in fact, of the most trifling description, pro-

vided it be not utterly worthless in fact and in law." And especially inadequacy of consideration can not be considered in determining what is or what is not a lottery, because the main element and the most objectionable element of a lottery, as of all other gambling schemes, is the want of consideration; that is, the winner gets something for nothing or for almost nothing, and the less inconvenience he is put to, or the less labor he has to perform, or the less money he pays to entitle him to a chance in a drawing of prizes out of proportion to such inconvenience or labor or payment, so much more apparent the gambling feature becomes. The promoter of the scheme of the character set out in this petition ought not, therefore, be permitted to say the inconvenience or labor of the holder of the calendar is small, when that inconvenience was sustained, and that labor performed at his special request and strictly in conformity to the terms prescribed by himself.

Does the proprietor of the Minneapolis Times intend the prizes he distributes daily as presents or gifts to the holders of the numbers? I do not think it will be seriously claimed that he does. Unquestionably he expects a return in some way, and the way is apparent. He advertises his paper. He induces *all* calendar holders to advertise, though *very few of them* receive prizes. He directs the calendar holder to preserve the calendar to "watch the Daily and Sunday Times for his number," and to read the directions how to get the prizes. The recipient of a calendar examines the directions and finds that in order to get a prize he must, if he holds a lucky number, "take or send the calendar to the Times office before 8 p. m. of the same day said lucky number is published," or if published on Sunday by 12 o'clock next day. How can he do all this without buying the Times or going to someone who does buy it? How is he to know that he holds a lucky number except by watching the papers daily? His friends can not notify him because his *name* is not published; all that is given are the *numbers* drawing prizes. The first thing a party receiving a calendar would think of doing, if he had any desire to draw a prize, would be to subscribe for "the

leading morning newspaper of the Northwest, delivered in any part of the city for the very small sum of 10 cents per week—7 days.” He dare not rely on stray copies that might occasionally fall into his hands, but he would have to implicitly obey the injunction to “watch the Daily and Sunday Times” for his number, and to do this effectually he would have to subscribe. If he does not subscribe he would have to go daily to someone who does, in order to watch the Daily Times. If he subscribes he would pay his money out, which, it is conceded, would constitute a consideration for a chance in the drawing, even if the paper was worth “10 cents a week—7 days,” and if he does not subscribe he would have to go daily to someone who does, in order to watch the Daily and Sunday Times, in which case he would perform a great deal of labor, besides finally sending or taking the lucky calendar to the Times office.

I can not do better than quote from the calendar of another promoter of a similar scheme, to show that there is a consideration. He says: “To the question ‘How can we offer to give away \$10,000?’ we answer, ‘By this system we save in the value of advertising space much more than the prices of the presents we offer (\$10,000), and divide by lot the amount so saved to the people as better inducement to preserve the advertisement herein contained.’ * * * We shall be satisfied with our rewards if our liberal distribution of money causes this little book to be read and preserved.” In that case the sender of the calendar was a vender of medicines, and he conclusively shows, as it must be apparent from complainants’ proposition, that the recipient of a calendar does perform a valuable service for the party who distributes the calendars. Indeed, so manifest is the consideration that it would support a contract. If complainant should offer to pay money for each calendar taken or sent to the Times office the courts would compel him to perform the contract, on the ground, as heretofore stated, that the party preserving the calendar and taking or sending it to the office performed some service and was put to some inconvenience at the request of complainant.

I do not presume it will be contended that the consideration for a prize ticket or card or number should be in money or property, but can not be in valuable services. Suppose complainant should offer to distribute by lot prizes from \$5 to \$50 daily to newspapers throughout the country which would insert an advertisement of the Minneapolis Times, or should offer to distribute prizes by lot to those who would deliver his paper to his patrons, or to those who would offer to set type for him three months, would anyone contend that he was not proposing to operate a lottery? If, then, valuable service rendered for a chance in a drawing be a sufficient consideration in *any* case to constitute the drawing a lottery, where are you going to draw the line? It must be at that point, and that point alone, where the service begins to be valuable, or where the recipient of a number entitling him to a chance in the drawing suffers some inconvenience, however slight, or performs some service, however trifling, at the request and for the benefit of the promoters of the scheme. And in this connection it should be noted that, according to Mr. Chitty's definition, it is not necessary that a benefit should, in fact, accrue to the promisor; it is enough "if it be such *as could be valuable* to the party promising." That the service of the calendar holders could be valuable service to the proprietor of the Times is manifest, from the fact that he offers to pay them from \$5 to \$50 daily. No man of the commonest business capacity would make such an offer, and especially would no one so strenuously insist on his right to do so, as to resort to the courts to enforce it, unless he expected to be benefited and unless experience shows that promoters of such schemes invariably reap a rich reward in money.

Now let us examine the cases that support, more or less strongly, the position I have taken. These are: *State v. Willis*, 78 Me. 70; *Dunn v. People*, 40 Ill. 465; *United States v. Olney*, 1 Deady, 461; *State v. Mumford*, 73 Mo. 647; *Thomas v. People*, 59 Ill. 160; *State v. Shorts*, 32 N. J. L. 465; *Wooden v. Shotwell*, 23 N. J. L. 398; *Seidenbender v. Charles*, 4 Serg. and Rowle, 151; *Negley v. Devlin*, 12 Abb.

Pr., N. S. 210; *Ex parte Blanchard*, 9 Nev. 101; *Randal v. State*, 42 Tex. 580; *Holman v. State*, 2 Tex. App. 610; *Eubanks v. State*, 3 Heisk. 488; *Hull v. Ruggles*, 56 N. Y. 424; *State v. Moren (Minn.)*, 51 N. W. Rep. 618; *State v. Kansas Mercantile Association (Kan.)*, 25 Pac. Rep. 984; *Taylor v. Smetton*, 11 Q. B. D. 207; *Hudelson v. State*, 94 Ind. 426; *Horner v. United States*, 147 U. S. 449.

In many of these cases newspapers offered prizes to subscribers and in others parties sold articles, accompanied in all cases by coupons or tickets entitling the holders to chances in drawings and the schemes were, uniformly, held to be lotteries, though the newspapers in one class of cases and the articles in the others were worth all that was paid for them.

In the last case cited above it appeared that the Austrian Government sold bonds for their face value, and with each bond a ticket entitling the holder to a chance in a drawing for the distribution of large sums of money in addition to the amount called for in the bond with the interest. The Supreme Court of the United States, after quoting with approval from the opinion of the Court of Appeals of Maryland, in *Ballock v. State* (73 Maryland, 1), said: "The court further remarked that it has been vigorously argued that because the money ventured must *all come back, with interest, so that there could be no final loss*, it could not be a lottery, and added: 'At some uncertain period, determined by the revolution of the wheel of fortune, the purchaser of a bond does get his money repaid, but we do not think this deprives the thing of its evil tendency, or robs it of its lottery semblance and features. The inducement for investing in such bonds is offered of getting some *bonus*, large or small, in the future, soon or late, according to the wheel's disclosures. The investment may run one year, or it may run thirty years, according to the decision of the wheel. It can not be said this is not gambling, and that it does not tend in any degree to promote a gambling spirit and of making gain through the chance of dice, cards, wheel or other method of settling a contingency. It certainly can not be said that it is not in the 'nature of a lottery,' and that it has no tendency to

create a desire for other and more pernicious modes of gambling.'” In the Horner case, and many of the cases cited above, the purchaser of tickets received full value for the amount paid, aside from the chances in the drawings. Hence in a legal sense it might very well be said *there was no consideration for the tickets*. But it was uniformly held that there was a consideration in that an inducement to purchase the articles sold was held out to the public in the giving of the tickets. Now, in the case under consideration, and the Alabama and Colorado cases, above cited, tickets in lotteries were given away in order to *induce people to advertise the several schemes and invest their money in them*. It is a direct appeal to the gambling spirit of the people, and in the language of the Court of Appeals of Maryland, in the Ballock Case, *supra*, “Our statute does not justify a court, expressly directed to so construe the law as to prevent every possible evasion, whether designedly or accidentally adopted, in deciding a thing is not a lottery simply because there can be no loss when there may be very large contingent gain, or because it lacks some element of a lottery according to some particular dictionary’s definition of one, when it has all the other elements, with all the pernicious tendencies, which the State is seeking to prevent.”

I have not had the pleasure of examining any brief or argument of counsel for complainant since the institution of this proceeding, but while the matter was pending before the Postoffice Department for a ruling I received an argument prepared, presumably, though not signed, by Mr. Sweet’s attorney. I wish to notice some of the positions assumed in the case presented to the court. I quote as follows:

“Why, then, is it not enough to make a lottery of any scheme where all the other essential elements are presented? Because the legislation against lotteries is solely to prevent persons from being *wronged*, and not to prevent any one from being *benefited*. This is *the only ground for suppressing them*. Because they do evil, not because they do good; because they impoverish, not because they enrich. In construing our definition of lottery, therefore, we must so construe it that the

word 'consideration' applies only to value parted with, or sacrifice made by, the receiver of the chance, and never to any benefit or pleasure derived by the managers of the scheme."

This reasoning is not sound, nor is the position taken correct in law or in fact. Who was *wronged in the Horner Case*? Did not every investor get back his money with interest, and was there in a single instance final loss to any one? No. Those who drew prizes were simply benefited above their fellows. But somebody was wronged in the Horner Case, and so is somebody to be wronged in the case before the court. The Supreme Court of the United States assumed that some bought Austrian bonds *because prizes were offered, who would not otherwise have invested*, and in such case such party was wronged, not because he would lose anything by the transaction, but because he was by improper means induced to buy something that he would not have bought in the absence of such means. But in that case the prizes were not to be paid out of money paid into the Austrian treasury by investors in bonds, but were to be paid out of revenues raised by taxation. If that scheme was a lottery and pernicious to society, how much more so is the one before the court? Here the prizes, from \$5 to \$50, every day, are to be paid out of the money to be furnished by the proprietor of the Minneapolis Times or by the people, *who are induced to subscribe for the Times by the offer of prizes, i. e., by the additional subscribers obtained by this offer alone*. It would take a wonderful stretch of the imaginative faculty to suppose that the proprietor of the Times expects to furnish the money, and hence it must be derived from those who subscribe solely to get the prizes. If the minimum amount in prizes (\$5) is distributed daily it would require 250 daily subscribers for the paper at 2 cents each, the price at which the Times is advertised to be delivered by newsboys, or if the maximum amount in prizes (\$50) should be distributed daily, it would require 2,500 daily subscribers to raise the amount, leaving out of view the cost of printing, material, and delivery. Now mark, it requires those subscribers in addition to those who take the paper in the regular

way for its news and advertising items, and these the proprietor expects to get because of the hope aroused in the human breast of winning a prize, and by that alone, for he could not afford to pay, nor would pay, such prizes daily out of the revenues received by him from the *ordinary* subscription list, which would come to him anyhow. And again it must be noted that the proprietor expects to make more than enough to simply pay the prizes. He expects to make a profit. If he did not expect all this, this court would not be called upon to decide that he had a lawful right to adopt such a scheme, nor would it be of enough importance for me to spend any time discussing it, because it would be harmless. Taking \$25 as the average amount to be distributed daily, it would take 1,250 of these additional subscribers to raise the money, and out of this number ten at \$2.50 each would get the prizes, leaving 1,240 who invested money hoping to get a prize with nothing, and to these must be added hundreds of other subscribers who went into the enterprise for the sole purpose of competing for a prize, to make any profit for the proprietor. Will those 1,240 and these additional hundreds be wronged? Certainly they will be, if those who bought Austrian bonds and who drew no prizes were wronged. It is no answer to say that the party subscribing for the paper gets full value, and no final loss can come to him, for that was the outcome in the Austrian bond case.

Complainant's attorney in the argument, on file in this office, urges that Mr. Chitty, in his definition of a consideration, and I overlooked the distinction between motives or inducements and considerations. It is true, I say, that the offer of prizes operates as an inducement to subscribe for the paper, but that is the word the Supreme Court of the United States used in the Horner Case. The court in that case assumed, and this court may very properly assume in this case, that the inducement is so strong that it brings forth fruit and that parties are induced by the offer of prizes to invest their

money or put themselves to inconvenience or perform some service when they would not otherwise do so.

In conclusion, I will add that in my judgment the schemes set out in the Alabama and Colorado cases above cited and the scheme now before the court appeal for their success to the gambling spirit of the people, and to that alone. They inspire the hope of realizing a sum of money out of all proportion to the amount they invest or to the inconvenience they suffer or labor they perform. They arouse the spirit of getting something for nothing. They are more pernicious than an avowed lottery. In the language of the Maryland court of appeals, quoted with approval by the Supreme Court of the United States in the Horner Case, "it can not be said this is not a species of gambling—and that it does not tend in a degree to promote a gambling spirit and a love of making gain through the chance of dice, cards, wheel, or other method of settling a contingency. It certainly can not be said that it is not in the 'nature of a lottery,' and that it has no tendency to create a desire for other and more pernicious modes of gaming." What a furore is created among the people by the distribution of prizes by the acrobat at the last of his performances or by the giving of a piano by a shoe dealer to the party holding a lucky card, or the daily distribution of from \$5 to \$50 to the persons holding the winning numbers of calendars. What a rush will be made daily by calendar holders to get copies of the *Minneapolis Times*, so that they may watch for their numbers. The promoter of the scheme knows what effect his offer will have on the people, and he knows that thousands will buy his paper, not for the news it contains, but to see if their numbers have drawn prizes. In this way he confidently expects, and if the experience of the past is to be accepted as an index to the future, his expectations will be realized, that the additional subscribers to his paper induced by this method will not only pay the prizes but leave him a handsome margin of profits besides.

My opinion is, the scheme is a lottery, appealing to the gambling spirit of the people for its success, and directly

tending to create a desire for more pernicious modes of gaming, and the calendar and the newspapers advertising it ought to be held nonmailable under the act of September 19, 1890.

The court, Judge Grosscup, presiding, dismissed the petition on the ground that the scheme was a lottery, but no opinion was filed, and there the matter ended, no appeal having been taken.

Sec. 16. The general rule relative to the consideration in schemes of this class, deducible from the adjudged cases and the elementary principles, may be formulated as follows: Where a promoter of a business enterprise, with the evident design of advertising his business and thereby increasing his profits, distributes prizes to some of those who call upon him or his agent, or write to him or his agent, or put themselves to trouble or inconvenience, even of a slight degree, or perform some service at the request of and for the promoter, the parties receiving the prize to be determined by lot or chance, a sufficient consideration exists to constitute the enterprise a lottery though the promoter does not require the payment of anything to him directly by those who hold chances to draw prizes.

THE PRIZE ELEMENT.

Sec. 17. There has been considerable discussion as to the meaning of the word "prize" as used in the definition of a lottery. In the most of these schemes the prize element is present beyond cavil or doubt, but here, as elsewhere, there are to be found cases lying along the borderland of doubt. It may be stated, as a general rule, that a prize in a lottery is a pure donation by the promoter to the winner. In other words, the winner must receive more than he invests and the difference between what he invests and what he receives must not have been earned by him or earned by money, property or service contributed by him before he can be regarded as having obtained a prize. It is not important that this difference between what is invested and what is received should be large, one of the essential elements being that it should be awarded

as a bonus or pure gift, i. e., that the winner gets something for nothing. It is also essential that some adventurers should receive more than others similarly situated in proportion to their investments. If the promoter of a scheme should advertise that he would receive small sums of money from investors in monthly instalments and would distribute the whole monthly income, after deducting his commissions, to some of his patrons by lot or chance, giving to the lucky ones the money they had invested with a certain rate of interest per annum thereon, the interest thus paid could be regarded as nothing but a prize because the money could not, according to the conditions of the scheme, earn anything, and would manifestly have to be lost by the unlucky ones. Take another illustration. A party advertises that he will receive small sums of money, monthly, from the people, for a term of years, twenty-five per cent of which he would invest at interest, ten per cent he would retain as an expense fund, and the balance of the income he would distribute monthly to some of his patrons by lot or chance, giving the winners the money they contributed with greater profits, than twenty-five per cent of what they contributed could, in the ordinary course of business earn; this excess of profits would be a prize because it could not be earned, and, in such a scheme, conducted in that way, some must lose in order that others may win and that is, at last, the supreme test in all gambling transactions. An analysis of such a scheme will show plainly its gambling elements, including a prize. Suppose ten men invest in the scheme, paying three dollars monthly. The income for a month would be \$30. The promoter takes out \$3 for his commission, leaving \$27; twenty-five per cent (\$7.50) is set apart to be invested at interest and there is left for distribution \$19.50. Suppose the twenty-five per cent is loaned at the beginning of the month, at ten per cent interest per annum. The interest at the end of the month would amount to six and one-quarter cents. The promoter selects by lot six of the ten investors to whom he pays the full amount of their investment with ten per cent interest per annum thereon. That would

give each lucky investor \$3.02 1-2, or to all the six \$18.15. There would be left \$1.35 in the fund for distribution and \$7.56 1-4 in the reserve fund, making a total in the treasury of \$8.91 1-4. Treating the four unlucky investors as, in equity, entitled the same amount each of the lucky investors received, it would require \$12.10 to pay them. Deduct from this the \$8.91 1-4 in the treasury and there is left a deficit of \$3.18 3-4 at the end of the first month. And the deficit will grow larger and larger in proportion to the number of unpaid investors the longer this plan on these conditions continues; and hence, it is evident that there must, of necessity, be a final loss to some by distributing to others profits which their money has not earned and according to the conditions of the scheme can not earn. This illustration is given to illucidate the foregoing principle but none of the many schemes of this character operated in the United States in the last few years is conducted upon so conservative a basis. In all, or nearly all, the promoters deduct, first, an initiation fee from each investor and then appropriate more than ten per cent of the monthly income for expenses, so that the deficit at the end of each month is much greater in the actual schemes than in the hypothetical case above given and the proportion of the losers must be larger.

Sec. 18. The Postoffice Department, in 1894 and 1895, permitted companies to operate schemes upon the plan above outlined on the ground that the prize element in them was lacking, but, after much discussion and after the opinion of the Attorney-General of the United States in the Bond Investment cases to be hereafter noticed, the Department reversed its policy and refused to permit the mails to be used to advertise a business conducted upon such conditions.

Sec. 19. There is another class of cases lying along the border land of doubt. In these cases the promoters offer to give to all contestants articles which they claim are of equal value, though of different kinds, the article each is to receive to be determined by the promoters at their discretion. The

Postoffice Department held that the prize element was present in these schemes for the reason that a contestant may draw something he personally has no use for or is unable, from a financial point of view, to keep and hence, to realize anything on it he must go into the market to sell it and as a rule he can not get one-tenth of the value placed upon it by the promoter. Take an illustration. A promoter of a business enterprise offers to distribute among his customers, at his discretion, plows, ladies' watches and gentlemen's watches, each of which he values at ten dollars. A farmer enters the contest, hoping to draw a plow, the lady enters hoping to get a lady's watch and a clerk with the expectation of getting a gentleman's watch. But the outcome is disappointing to all but the lucky one. The farmer draws a lady's watch, the lady a plow, and the clerk a gentleman's watch. The farmer and the lady are forced into the market with the articles and fail to realize anything like ten dollars each, and hence they may very properly be regarded as losers, while the clerk drew what he wanted and may very properly be regarded as a winner. When these schemes were presented to the Department it became manifest to the postal officials that there could be no motive in giving *different* articles unless there was a difference in value, no matter what the promoters claimed, and hence, to eliminate the prize element, the promoters were required to give the same thing to each contestant or give the contestants their choice of the articles claimed to be of the same value. In other words, the Department gave the discretion of selecting the articles to the customers instead of the promoters. Reluctance on the part of the promoters to yield this discretion to their customers was regarded by the Department as conclusive evidence that they desired to retain an advantage to the detriment of those who dealt with them. In this connection it must not be forgotten that the most of the gifts in the schemes of this character were offered by irresponsible parties and were made up chiefly of pinchbeck jewelry and cheap watches, clocks, etc., and an exorbitant value, out of all proportion to their true value, was placed upon them. Those who patron-

ize such enterprizes do not know or forget that their promoters intend to and do recoup the cost of the gifts in some way.

This identical question has not been before the courts but the case of *U. S. vs. Beatty*, 60 Fed. Rep. 740, though a case involving a fraudulent transaction, throws some light on the principle above announced.

In that case the court held, in construing section 5480, R. S. U. S., that the defendant might be guilty of perpetrating a fraud if he did not send such an organ as he represented he would send "even if one as good or better was intended to be sent. The particular kind might be material to the purchaser and his money might be obtained by false pretenses as to that although not profitable to the seller."

Sec. 20. But the definition of prize, thus far stated, includes much more than a lottery prize includes. A prize, in its general sense, as has been shown, includes everything donated to a party for which the party receiving it has not given a *quid pro quo* or at least not a sufficient *quid pro quo* and in this sense it would include money or property staked or promised upon ordinary wagers as well as that offered in lottery schemes and it would also include money or property offered in legitimate contests of skill, speed, strength, endurance, knowledge, etc. It is important, at this point, therefore, to ascertain, as far as practicable, the limitations of that word, in its relation to lottery schemes. Here, as well as elsewhere, it is difficult, if not impossible, to accurately distinguish a lottery prize from ordinary bets and wagers or to distinguish it from that which is given as a reward for excelling in contests of skill, speed, strength, endurance, knowledge, etc., in which the gambling element is not present. This subject, in a general way, has received some consideration by the English courts in cases involving the construction of the Statute of 8 and 9 Vic. C. 109, S. 18, which declared all wagering or gaming contracts void, with the proviso that the enactment should not apply to any subscription or contribution for or toward any prize to be awarded to the winner of any lawful game, sport, pastime or exercise. At first the courts there held that money

or property actually staked or bet on a race or game, though by way of wager, by two or more parties, to be awarded to the winner, was simply a prize under this proviso and that it made no difference whether there were two or fifty subscribers to the fund; but that money or property not deposited, but which was simply promised to be paid or delivered, did not come within the proviso. *Batty vs. Mariott*, 5 C. B. 818; *Parsons vs. Alexander*, 1 Jur. (N. S.) 660; *Johnson vs. Lansley*, 12 C. B. 468; *Brown vs. Overbury*, 11 Exch. 715; *Irwin vs. Osborne*, 5 Ir. Rep. 604; *Crofton vs. Colgan*, 10 Exch. Rep. 133, and *Coombs vs. Dibble*, L. R. 1 Exch. 248. The judges, in some of these cases, did not give their full assent to the doctrine and afterwards it was rejected, in toto, by the Court of Appeals in *Diggle vs. Higgs*, 2 Exch. Div. 422, and later by the Judicial Committee of the Privy Council in *Trimble vs. Hill*, 5 App. Cas. 342.

In the *Diggle-Higgs* case the court held that this proviso applied only to prizes in agreements which were not in the nature of wagers and that it made no difference whether money or property was actually deposited or only promised to be paid or delivered and this ruling was followed in *Trimble vs. Hill*. These cases, while they do not leave the matter very clearly settled, afford a number of illustrations of transactions which are *not* subscriptions to a prize and it may be stated that they settle these propositions:

1. The prize mentioned in the proviso must be offered in a transaction which is not at all in the nature of a wager.
2. The mere deposit of stakes by two or more parties to be awarded to the winner in any race or game is a wager and nothing more.
3. The winnings, contributed by the competitors themselves, are not prizes, while money or property, contributed by a stranger, who could not win, but who was sure to lose that which he contributed, was a prize within the proviso. In *Applegarth vs. Colley*, 10 M. and W. 723, the distinction was made between winnings deposited by the competitors and a sum added and that the deposits might be in the nature of money won on a wager while the "sum added" by some out-

side person was a legitimate prize, which the winner could recover.

"The difference," argued Sergeant Byles, in *Allport vs. Nutt*, 1 C. B. 974, "between a lottery and a sweepstakes is this: In a lottery, the party getting it up receives from the purchasers of the tickets more than the value of the prizes; whereas, in a sweepstakes all the money obtained from the subscribers is paid over to the winners; the party, to whom the subscriptions are paid, is a mere stake holder."

Sec. 21. In *Harris vs. White*, 81 N. Y. 532, the court held that a prize, offered by an authorized association, for the fastest horse in a race, was not a bet or stake within the New York Statutes.

In the case of a bet, as defined by Chief Justice Folger, "each party gets a chance of gain from others and takes a risk of loss of his own to them. But a purse, prize or premium is, ordinarily, some valuable thing, offered by a person, for the doing of some thing by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered but must certainly lose it." In that case it was urged that the payment of entrance fees by the competitors in the races was the staking of so much of their own money upon the result but the court decided otherwise on the ground that the identical money contributed by the competitors themselves was not paid "as in *Gibbons vs. Gouvenor*, 1 Denio, 170, for the express purpose of making a stake to be specifically trotted for, and for no other purpose, and with the previous agreement that the very sums thus paid should form the stake, and go, the whole of it, to the winner of the race." This case was cited as controlling authority in *People ex rel. Lawrence vs. Fallon*, 152 N. Y. 12, which case also involved the question as to what was a prize as contradistinguished from a bet or ordinary wager. In *Alvord vs. Smith*, 63 Ind. 58, the court, in distinguishing a bet or wager from a premium, said: "In a wager or bet there must be two parties, and it is known before the chance or uncertain event, upon which it is laid, is accomplished who are the parties, who must lose or win.

In a premium or award there is but one party to the act, thing or purpose for which it is offered has been accomplished. A premium is a reward or recompense for some act to be done. A wager is a stake upon an uncertain even."

To the same effect are *Delier vs. Ply. Co. Ag. Soc.*, 51 Iowa, 481; *Missner vs. Knapp*, 13 Oregon, 135 (57 Am. Rep. 6); *Hankins vs. Ottinger*, 115 Cal. Rep. 454, 40 Law. Rep. Ann. 76; *Ballard vs. Brown*, 67 Ver. 586.

These cases do not make a clear and well-defined distinction between a prize or premium and an ordinary bet or wager. Judge Folger says a prize is, *ordinarily*, a valuable thing, offered by a person into the strife for which he does not enter and it is evident he used the word "ordinarily" advisedly, because there can be and, no doubt, there are contests for prizes, into the strife for which the parties, offering them, do enter. The party, offering a prize for the fastest horse, may enter his own horse in the race and so may the promoter of a lottery scheme retain for himself tickets, either because he desires to retain chances for the prize offered, or because he can not sell all the tickets.

And that the court, in *Alvord vs. Smith*, and the other cases above cited, had in mind a lawful prize, not in the nature of a wager, clearly appears from the statements that a wager is "*a stake upon an uncertain event*," and "*a premium is a reward or recompense for some act to be done*."

Sec. 22. If we appeal to the lexicographers, we can not reach a more definite conclusion in regard to the meaning of this word in its relation to lottery gambling. Mr. Webster defines prize thus: "An honor or reward striven for in a competitive contest; anything offered to compete for, or as an inducement to or reward of effort." Thus far Mr. Webster evidently intended to define a prize in a lawful contest or effort which does not contain the element of a wager, for he immediately proceeds to add that a prize is "that which may be won by chance, as in a lottery."

The Century Dictionary defines prize in relation to lawful competition thus: "That which is obtained or offered as

the reward of exertion or contest, as a prize for Latin verses;" and then defines the word in its gambling sense generally as "that which is won in a lottery or any similar way."

Here is where the court and lexicographers leave the definition of prize.

While the limitations of the word prize, in its application to lottery gambling, can not be definitely and accurately stated, the following propositions may be considered as settled by the foregoing authorities and in the light of reason: 1. That which is offered as a prize must be in the nature of a pure donation. 2. The prize must be offered in a contest or scheme that contains the element of a wager. 3. Ordinarily the prize must be offered by a party who can not win but must lose it and into the strife for which he does not enter.

Exceptions to the third proposition may and probably will arise but it is not thought advisable, even if it were possible, to undertake to state them in advance of the concrete cases in which they may be presented for adjudication. The true meaning and nature of the second proposition will be examined when we come to consider "prizes dependent upon lot or chance."

LOT OR CHANCE.

Sec. 22a. This is the most important element of a lottery and at the same time it is, by far, the most difficult to accurately define.

Lot, in its relation to gambling, is evidently a more limited term than chance and applies more specifically to those schemes wherein some mechanical device, such as a die, ball or slip of paper, is used to determine the winner, and denotes an entire absence of all means of calculating results. In this sense lot is equivalent to *pure chance*, while chance, without qualification or limitation, is a generic term, including lot and all other methods devised to determine the event, upon which a stake or prize is to be awarded to the winner. Chance, being a generic term, in which lot is comprehended, will alone be

made the subject of a critical examination in order to determine its meaning and scope in its relation to lottery gambling.

Sec. 23. The primary definition of chance, as given by Webster, is that, "it is a supposed material or psychical agent or mode of activity, other than a force, law or purpose." In times past this was unquestionably the popular conception of chance. The Romans deified and worshiped chance under the name of Fortuna, and the Greeks under the name of Tyche. This goddess, as popularly conceived, worked without law and dispensed her prizes indifferently and capriciously. In the present age of enlightenment and advancement, however, this conception of chance few, upon reflection, would be disposed to entertain as corresponding to anything which really exists. The religious mind rejects it as inconsistent with a belief in Divine Government, and the philosophical mind excludes it as inconsistent with due recognition of the universal laws of causation. And yet, in a sense, the old superstition prevails to this day. Among all classes everywhere in the world attempts, even serious attempts, are made to exorcise this unseen, unknown agent, or force, or goddess, or whatever it may be called, by talismans, charms, mascots, etc., in endless forms and varieties, and the fortune teller, even in this age, is able to fleece the people, because of his supposed power to pierce the veil that hides the future from us and reveal its secrets. But chance, when examined philosophically, it is manifest, has no real existence as an agent or force and our conception of it, when thus considered, is subjective rather than objective. When reason is allowed full sway and emotion and mere sentiment are wholly eliminated from consideration, all recognize that every effect has an adequate cause, whether that cause be known or unknown and that every cause will produce or has produced its legitimate effect, whether we know or do not know that effect. It is not logically correct to say that anything happens by chance. In this universe of ours there is an infinite number of causes, remote and proximate, direct and indirect, potent and weak, which contribute to bring about results and so many of these causes are hidden

from us, that we find ourselves utterly unable, in the most of cases, to forecast the future, and predict with certainty what will or will not occur, or even to tell what has already occurred until it is revealed to us. But we know, notwithstanding this limitation of our mental faculties, that we do not live in a world of chance, and when we speak of chance as being an efficient cause of an effect we simply mean to signify our ignorance of the real causes that have operated to produce or the conditions that surround that effect.

Sec. 24. Mr. Webster, after having given the above definition of chance, quotes Samuel Clark as follows:

"It is strictly and philosophically true in nature and reason, that there is no such thing as chance or accident; it being evident that these words do not signify anything really existing, anything that is truly an agent or cause of any event; but they signify merely men's ignorance of the real and immediate cause."

And in Chamber's Encyclopaedia we find this language:

"Chance, in its original and strict meaning, may be defined as that which determines the course of events, in the absence of law, ordinary causation, or providence. Strictly speaking, it is an idea, which few would now be disposed to admit as corresponding to anything which really exists; the religious mind excluding it as inconsistent with the belief in the Divine Government, and the philosophical mind rejecting it as inconsistent with a recognition of universal laws of causation. As a word, however, it has always been, and always will be popularly accepted; and its use is correct so far as we overlook, or choose for the moment to throw out of view, the more universal connection of events, and regard them as their emergence, on a superficial view, appears to be determined."

Mr. Jefferson in his memorial to the Virginia Legislature, heretofore referred to, speaking of chance, said:

"Nothing happens in this world without a cause. If we know the cause we do not call it chance; but if we do not know it, we say it was produced by chance. If we see a loaded die turn its lightest side up, we know the cause and that is not the

effect of chance; but whatever side an unloaded die turns up, not knowing the cause, we say it is the effect of chance."

Sec. 25. Thus we find these authors, as, upon examination, we will find all scientists and logicians concurring in the proposition that in fact, there is no such thing as chance anywhere in the universe and when we examine our idea of it critically, we find that in the use of the term we mean simply to signify our ignorance of events and its employment is correct so far and only so far as we overlook or choose for the moment to throw out of view the more universal connection of cause and effect and regard the events as their emergence, on a *superficial view, appears to be determined.*

While this conception of chance has been the one adopted by an overwhelming majority of the courts and of the officers clothed with the power of construing and administering the laws against lotteries, a few courts and officers have evidently proceeded upon the theory that chance is an existing agent and that it inheres in events themselves, rather than in our ignorance of events. This theory is wholly erroneous, as will clearly appear by a few illustrations.

Sec. 26. Before an election a party bets that a certain candidate *will be elected.* When we regard the chances of winning such a bet, we have regard, primarily, to the event itself, which is to occur in the future. At the close of the polls but before the result is known, a party bets that a certain candidate *has been elected.* The event itself in that case has been determined and if there be any chance of the bettor's failure to win, it must relate solely to his ignorance of what the result of the election is. A promoter of a scheme offers a prize to the party giving the correct word omitted in a given sentence and provides that the correct word shall be determined by himself or by a committee to be appointed either by himself or by the adventurers. Here the missing word, the event, is to be ascertained in the future and, primarily, we conceive of the chance of winning, as inhering in the event itself. Another promoter offers a prize for the missing word, which he states, in advance, he has selected and sealed in an envelope.

Here the event (the correct word) has been determined and our conception of the chance of winning confessedly relates to our ignorance of the emergence of the event. A man bets that in tossing a dollar heads *will turn up* and he regards his chance of winning as dependent on the event itself. But suppose he is blindfolded and after the dollar has been tossed and has fallen to the ground, he bets that heads are up. In that case he conceives of the chance of success as relating to his ignorance alone of what has already occurred.

A promoter issues one thousand tickets in a lottery scheme and advertises that he has selected a certain number as the prize ticket, and has locked it up in a safe and offers the prize to the adventurer, who may per chance hold the ticket with the corresponding number on it. Here the prize ticket has been selected and the adventurers regard their chances of winning as inhering in their ignorance of the event, that is in their ignorance as to the number of the prize ticket, and yet their conception of chance in this scheme is not the same as in the cases above given, unless they have the privilege of selecting the numbers they will pay for. If they have that privilege then they are conscious of no other chance than that, which arises from their ignorance of the number of the prize ticket which has been selected. But if the tickets are drawn and sold at random the adventurers at once notice that another element enters into the chance and, that is, they do not know the number of the prize ticket nor do they know the numbers of the tickets they are to receive and hence their conception of the chance in that case has a two-fold aspect in that it relates first to their ignorance of the prize number, which has already been selected; second, to a future event, that is to the numbers of the tickets they will draw. But suppose the promoter advertises that he has issued 1,000 tickets and that when they are all sold he will place 1,000 tickets, with numbers corresponding with the numbers of those sold, in a box or wheel, from which they will be drawn out at random and the party holding the ticket corresponding in number for instance with the hundred and twenty-ninth ticket drawn, shall have the

prize. Here the adventurers know the numbers of the tickets they hold and they conceive of the chance of winning as dependent on an event that is to happen in the future, that is the number of the hundred and twenty-ninth ticket to be drawn.

In all these cases and in a great variety of others that might be given the adventurers are conscious of a difference in the conception of chance in its relation to the different conditions named and yet they feel that the probability of winning is the same whether they regard the chances as inhering in the events themselves, which are to occur in the future, or in their ignorance of the events, which have already been determined.

But this distinction is more apparent than real, for on a critical examination we will find that our conception of chance whether it relates to an event that has not occurred or to an unknown event that has occurred, relates, in fact, to the *state of our knowledge* in regard to the event in both cases. In the one case, we are ignorant of what will occur, while in the other we are ignorant of what has occurred, and in both cases we venture our money solely on account of our ignorance.

Sec. 27. In this sense chance has the same signification as uncertainty or accident. It is philosophically true that there is nothing uncertain or accidental in the domain of mind or matter. Conditions and causes, though unknown and in many cases unknowable, are at work, which operate by immutable laws and produce inevitable results, as unerringly as the laws of the universe hold the heavenly bodies in their orbits, and hence when we speak of uncertainty or accident, we merely mean to express our ignorance of the fact or event to which we apply the terms and the terms are proper, so far and only so far, as we overlook, or choose for the moment to throw out of view the more universal connection of events and regard them, as their emergence, on a superficial view, appears to be determined.

Sec. 28. Another mistake made in the discussion of this subject has been in disregarding or overlooking the distinction between chance and probability. Because in some cases the probability of winning was greater than in others it was

supposed no chance at all was present. If there are only two tickets in a lottery scheme, the holder of one of them has one chance to lose against one to win. In other words, the chances are equal. Issue 1,000 tickets and the holder of one ticket has one chance to win against 999 to lose. Issue 1,000,000 tickets and the holder of one has one chance to win against 999,999 to lose. Chance, in the scheme, where there are only two tickets, is precisely the same as in the scheme where there are 1,000,000 tickets but the probabilities as to winning and losing are vastly different. In the cases named it is easy to calculate the probabilities but there are schemes in which it is difficult to determine what the favorable and adverse probabilities are. Take the case where a newspaper offered a prize to the party who would guess nearest the number, consisting of six figures, of a treasury note, the figures in the number being given but not in the order they appeared on the note. Here the adventurer would have to determine how many different possible positions in which the six figures could be placed before he could determine the probability of his winning or losing. There are other cases where the probabilities can not be determined in advance at all. Take a case, to illustrate this class, where the promoter puts 1,000 tickets on the market but states that the drawing will occur if 500 tickets at least are sold. Here the adventurers, at the time they invest their money, can not know whether all of the tickets will be sold or not and hence they are utterly unable to calculate, at that time, their chances in the scheme. Again suppose a promoter should offer a prize to the party guessing nearest the degree of temperature the thermometer would mark on a given day, one party being entitled to only one guess, the number of guessers not being limited. Here the adventurers can not calculate the probabilities of winning, because they do not know the number of the competitors. Then again the probabilities of winning may be increased as the drawing progresses. Suppose twenty-five numbers, from one to twenty-five

inclusive, are put in a box, there being one prize number and the drawing begins.

Before any number is drawn out the chance of the prize number being drawn is one to twenty-four. After one is drawn, it not being the prize number, the chances against it being drawn next time are twenty-three to one and so on till only one is in the box and then all chance disappears and that the prize number will be drawn next time, it not having been previously drawn, becomes a certainty. It will be noticed in this illustration, that the chance of drawing the prize number is not increased as the drawing proceeds, but the chance of its not being drawn decreases until the prize number alone remains in the box, when all chance, for and against that number being drawn next time, disappears. And until that point is reached bets could be obtained that the prize number would alone remain in the box but when that point is reached not only all chance in the drawing disappears but the possibility of obtaining a bet on the last drawing from sane men would also vanish. But let this suffice on this particular phase of the subject, as the Doctrine of Chances or the Theory of Probabilities does not come within the scope of this treatise.

Sec. 28a. Some of the courts have held, at least indirectly, if not directly, that in order to constitute a lottery *pure chance* must inhere in the scheme. *People ex rel. Lawrence vs. Fallon*, 152 N. Y. 12.

It is not clear what the courts in this and other cases meant by "pure chance," for it is not probable that they had overlooked a large class of cases in which it was held that the schemes constituted lotteries though the chance element therein might have been influenced, at least, if not controlled, by skill or forethought.

Black in his Law Dictionary states that "pure chance is the *entire absence of all means of calculating results*;" and it may be stated that pure chance exists only in those schemes, wherein there is simply a mechanical drawing or selection, which can be done as well by a machine or a child as by the most intelligent man. In all other schemes such as card play-

ing, horse racing, hazard, etc., skill or knowledge may play an important, though not a controlling part.

Sec. 28b. In the missing word contests which have been held to be lotteries where reason and forethought have some bearing on the result, the contestants must select from all known words a word, which taken in connection with the words given, will complete the sense of the sentence and this can not be done so well or so correctly by a machine or a child without experience or learning, as by an intelligent person in the exercise of the reasoning faculty.

Sec. 28c. Suppose the wheel is resorted to, to supply the missing word in this sentence: "She is the most —— woman I ever met." All the words in our language would be put into the wheel and a word wholly inappropriate would as likely be produced as one that would make the sense complete; indeed the chances that a word wholly inappropriate would be produced would preponderate in the ratio of about 10,000 to 1, as the inappropriate and appropriate words in our language for the missing word in the sentence are about in that ratio. The same result would follow if a child, which knows nothing of the meaning of words, should select the word. The child, in such case, would be merely a machine. But suppose an intelligent man should be asked to supply the word. He would at once discard all the manifestly inappropriate words of our language and confine himself to the few, probably less than twenty-five, that would complete the sense. In the latter case can it be said that there is an entire absence of all the means of calculating results or that a machine or child is as likely to select the correct word as an intelligent, educated man? And yet if a prize should be offered for the correct word in that sentence (and by the correct word is meant the word that has been or may be arbitrarily selected by the promoter or someone else) the scheme would confessedly be a lottery.

Ses. 28d. It is universally conceded that in tossing a coin or die, or turning a wheel or an arrow upon a wheel, it is a matter of chance which side of the coin or die will turn up or what figure the wheel or arrow will register and yet when we

see what acrobats and slight of hand performers do, we can not doubt that men and women too can, by exercise, skill and adroitness, apply such force to the coin, die, wheel or arrow as to almost unerringly control the result. When we look at a man throw six sharp bowie knives into the air in quick succession so that they all are seemingly in the air at the same time and take each one unerringly by the handle without injury to himself as it comes down, can we doubt that he could acquire the skill to toss a coin into the air so that heads or tails would turn up at his pleasure or that he could apply such force to a wheel or arrow as to cause it to stop at the point he desired?

Sec 28e. Many of the courts, text writers and lexicographers, as has been shown, call a lottery a game of hazard. Webster defines hazard to be "that which falls or comes suddenly; a fortuitous event; chance; accident; casualty." * * * "*To run the hazard*, to do or neglect to do something when the consequences are not foreseen and not within the powers of calculation; to take the chance; to risk." He also gives as a definition of this word "a game of dice," but marks it obsolete.

In Chamber's Encyclopaedia, under the title "Hazard," it is stated hazard is a game at dice without tables, which can be played by any number of persons. After stating how the game is played the article concludes thus: "Hazard is exclusively a game of calculation, and is never played merely with a view to amusement. Essentially an essay of calculations and combinations, requiring a cool and clear head to execute them, it has been an incitement to the wildest schemes under the name of 'systems,' that ever laughed mathematics to scorn. Hazard has been long a standing game at all the houses of play in Britain, in the face of a fact that owing to the intricacy of the calculations of probabilities the odds in favor of the professional player over the amateur are 100 per cent. 'In spirit, if not to the letter, it is the arithmetic of dice.'"

Sec. 28f. A lottery scheme is also called a game of chance, not a game of pure chance; and many of the courts in

the "Option Deal," horse race and other cases, hereafter cited, compare the chance of the future price of an article, the chance in the result of a horse race and the chance when a railroad in process of construction will be completed to the kind of chance in the turning of a card or die and betting on such a result to betting on a game of faro, brag or poker. Certainly experienced men may make reasonable calculations as to the future price of wheat or stock or the completion of a railroad and yet these events are so uncertain as to justify the courts in deciding that making money or property dependent upon them is not only gambling but gambling of the same kind as with cards or dice.

Sec. 29. The distinction sought to be made between chance in lottery gambling and chance in ordinary gambling, requiring pure chance in the former and simply chance in the latter is not sound and lottery schemes can not be confined to those wherein pure chance is found. None of the law making bodies in this and other countries has ever, in defining or prohibiting lotteries, qualified "chance" by the adjective "pure" and the courts are not justified in interpolating that qualifying term in the statutes.

In the case of *People ex rel. vs. Fallon*, 152 N. Y. 12, it was not necessary to make the distinction above noted, as the court decided that the transaction in that case was neither a wager nor lottery and hence it follows that the prize was not dependent on either chance or pure chance.

The evil the statutes were intended to suppress is gambling and whatever scheme, having all the other elements of a lottery, which appeals to the gambling spirit, and in which a prize is made dependent on an event unknown to such an extent as to induce men of equal intelligence to risk their money or property on the result, should be adjudged a lottery, for in such case the prize is made dependent upon chance in its gambling sense and such scheme begets "a love of making gain through the chance of dice, cards, wheel or other methods of settling a contingency and has in it all the elements and ten-

dencies, which the Government is seeking to prevent." (Horner case.)

Such a scheme involving such a chance would undoubtedly be an enterprise similar to a lottery or so called gift concert, no matter what rule ought to be applied to what have been heretofore known as regular lotteries.

PRIZES DEPENDENT UPON LOT OR CHANCE.

Sec. 30. Having ascertained the true nature of chance, and our conception of it in general, the subject in relation to the lottery schemes, mentioned in the Anti-Lottery Act of Congress, will now be considered. That act provides that, "No letter, postal card or circular concerning any lottery, so-called gift concert or similar enterprise, offering prizes dependent upon lot or chance," etc., shall be carried in the mails. It will not be necessary to determine the difference if there be any difference between a lottery, a "so-called gift concert" or "similar enterprise." In all three cases, prizes dependent on chance, must be offered and the inquiry may, therefore, be directed, at once, to the meaning of the words in the act, "offering prizes dependent upon lot or chance." What a prize is in a lottery scheme has already been discussed and determined; and we will now inquire when prizes are dependent upon lot or chance. In the answering of this question the ingenuity and resourcefulness of the gambler find a wide field for debate. The gambler insists that, in all human transactions, there is chance and he argues that his stake on chance is as legitimate, morally and legally, as the money the business man invests in a town lot, in a house, in the cargo of a ship, in merchandise, in life or fire insurance, in farming and in other transactions because he, in any of these ventures, takes his chances of losing what he puts in or at least a portion of it or of making a profit large or small. That the financial success or failure of human transactions is largely dependent upon what we call chance can not be denied and it becomes essential to differentiate a gambling deal from a legitimate transaction. This differentiation may be formulated thus: A legitimate transaction in-

volves the giving or delivery of something of value on both sides and if there be any chance in regard to the value of what is given or delivered on either side each party takes that chance as to what he gets and the other party has no further concern about it, while in a gambling deal, a prize, dependent on chance, is to be awarded to one of the parties. This can be made clear by an examination of stock jobbing transactions. There is no question that two parties may legitimately agree that one will buy and the other will sell any article of merchandise to be delivered in the future at a fixed price or at the market price of the article at the time of sale or delivery, provided there is a *bona fide* intention of, at least, one of the parties, that the article shall in fact be delivered and paid for and it is equally well settled that such parties, having made such a contract, may, afterwards, by mutual consent, cancel the contract and agree upon the damages the party in default shall pay to the other party. But, if at the time of the contract, it is mutually intended and understood by all the parties, whether expressed or not, that the commodity, said to be sold, was not to be paid for nor to be delivered, but that the contract was to be settled and adjusted by the payment of the difference in price; if the price should decline, the purchaser paying the difference, if it should rise, the seller paying the advance, the contract price being the basis upon which to calculate the differences, that would be a gambling transaction and void. This distinction has been made so often and so universally by the courts that it is not necessary to cite any authority in support of it; but it is clear from the adjudged cases that in one case money or property is not staked on chance or hazard or uncertainty, while in the other it is. In the actual sale transaction the parties to it do not intend to gamble, wager or bet and whatever profit comes to one above what the other may realize is universally held by the courts, and by mankind too, to be perfectly legitimate as well as moral, because it is manifest that if the courts should recognize unforeseen influences and conditions unknown at the time or arising after sale which

affect the prices of commodities or things sold, as sufficient to annul contracts of sale or barter, the business and commerce of the world would, at once, come to an end. In a fair and legitimate transaction the parties proceed upon the conditions then known to them, and fix the price of the thing sold in the light of such conditions and in the absence of fraud, such a transaction will stand, though it may turn out afterwards that the conditions upon which the parties acted were wholly illusory and misleading, whereby one of them made a large profit and the other suffered a serious loss.

Each party to a *bona fide* sale or trade assumes all the chances and takes all the risks of the fluctuation in the market of the price of the thing he gets or does not get. After the sale or trade each party stands in precisely the same relation to the thing he gets as if he had not received it from the other party at all but had made it himself or had always owned it.

Sec. 31. And these observations apply to contracts for the future delivery of property at a price fixed at the time of the contract or to be fixed by the market price at the time of delivery. In such a case nothing is dependent on chance or hazard or uncertainty so as to make the contract a gambling transaction because, the delivery which is the main thing is to be made in any event and the price of the thing delivered, whether fixed at the time of the contract or at the time of the delivery, is a collateral incident. If the price be fixed at the time of the contract, it may not be the same at the time of the delivery or if it be fixed at the delivery, it may not be the same as it was at the time of the contract, but in either case it is fair for one as it is for the other and this variation in the price is not allowed to taint the transaction with the immorality of gambling and thereby make it void. The courts have held that it is absolutely legitimate to fix the price in this way. Both parties to such a transaction get *quid pro quo* and it is a basic principle in Political Economy that a fair bargain is a mutual benefit to the persons between whom it is made.

Sec. 32. But this is not true of a contract where "margins" are deposited and their return, either with or without a profit, is made dependent on the fluctuations of the market in the future in the price of the article, in respect of which the deal is made, there being no intention on either side to deliver the article itself or pay for it. In such a case one of the parties must be loser and the other winner and one will get something for nothing and the other nothing for something, and the courts have uniformly held that such a contract is a wagering transaction and while not always employing the same terms they have concurred in the view that by such wagering contracts, the parties to it have made the payment of money dependent on chance.

Sec. 33. The Court, in *Rumsey vs. Berry*, 65 Me. 570, speaking of an option deal in wheat, said: "This is what is called a settling of the differences, and as such, is clearly and only a betting upon the price of wheat."

Sec. 34. In *Fontenbury vs. State*, 47 Ark. 188, the Court said that the phrase, "dealing in futures," had "acquired the signification of mere speculation upon chances" and again that wagering contracts are those in which the parties stipulate that they shall gain or lose upon the happening of an uncertain event in which they have no interest except that arising from the possibility of such a gain or loss.

Sec. 35. In *Lyon vs. Culbertson*, 83 Ill. 33 (25 Am. Repts. 349), the court spoke of an option deal in wheat as "only gaming on the price of wheat" as a "bet on the price of grain during or at the end of a limited time" and "a gambling on the price of the commodity."

Sec. 36. *Cunningham vs. Bank*, 71 Ga. 400, was an action on a note, given on account of dealings, commonly called futures, where no intention, on either side, existed to deliver or pay for the commodity. The court said: "If this is not a speculation on chances, a wagering and betting between the parties, then we are unable to understand the transaction. A betting on a game of faro, brag, or poker can not be more hazardous, dangerous or uncertain."

Sec. 37. Eldred vs. Malloy, 2 Col. 320 (25 Am. Rep. 752), illustrates in a forcible way not only the meaning of "chance" in its relation to gaming but also the difference between a legitimate transaction and making the payment of money depend on chance. That case was an action upon a note for \$500, which was executed on a wager as to when the Colorado Central railroad would be completed to Golden City, in the Table mountains. The road was completed within the time named in the note. The court thought it had enough to do without solving "questions arising out of idle bets made on dog and cock fights, horse races, the speed of ox trains, the construction of railroads, the number on a dice or the character of a card that may be turned up" and could "see no difference in principle in the bet that the faro dealer would turn up a jack the next turn and the bet that the railroad will be built to Table mountain in so many days." Here the wager was on an event that was largely subject to the control of one of the parties but it being in a degree uncertain the court held the staking of money on it to be a wager, a bet, and it being such, placed the transaction on the same plane as a bet on the number on a die, or the character of a card that might be turned up. In other words the payment of the \$500 was made to depend on the chance, whether the railroad would be completed within the time named or not, and the chance in the case consisted wholly in the fact that the event was not known definitely and certainly to the parties when the note was given.

But suppose that the plaintiff in that case had hired the defendant to complete the railroad to Golden City within a specified time with a provision, that if not so completed, the defendant should pay plaintiff \$500, as damages for breach of contract and it had been made to appear that that was a reasonable sum as compensation for the non-fulfillment of the contract within the time specified. In such case there would have been no gaming, no bet, no staking money on chance but there would have been a legitimate agreement to pay \$500 as a *compensation* to the party not in default.

Sec. 38. The cases of *Johnson vs. Fall*, 6 California Reps. 359 (65 Am. Dec. 518) and *Beadles vs. Bless*, 27 Ill. Reps. 320 (81 Am. Dec. 231) involved also questions in relation to the completion of railroads. In the California case the contest was in regard to a note, given by the defendant to plaintiff, on a wager to the effect that he would pay the plaintiff five thousand dollars, two years after date, if within that time a certain railroad, in which the defendant was interested, was completed and in the Illinois case the controversy related to an agreement for \$100, which was to be paid at a designated time, provided the ties and rails were laid on a certain railroad by that time. In both cases it was held that, as wagers at common law, unless contrary to public policy or good morals, were not illegal, the makers of the obligations in question were liable thereon, though they grew out of wagering transactions. The question of chance was not discussed but in the Illinois case the court drew a distinction between a wagering contract and an agreement to pay money, dependent on a future contingency, in this language: "This, in form at least, is simply a contract for the payment of money, dependent on a future contingency; and in that aspect, is quite unexceptionable.

"The testimony, however, gives the transaction something of the character of a wager, and shows that a similar agreement was given by the payee to the maker of this agreement, payable upon the opposite contingency. But if viewed in the light of a wager as we understand the common law, the plaintiff has a right to recover upon it."

Sec. 39. In *Brua's Appeal*, 55 Pa. St. 294, which involved an option deal, the court denounced, as gambling anything which induces men to risk their money or property without any other hope of return than to get for nothing a given amount from another, no matter by what name it may be called and that it is the same whether the promise be to pay on the color of a card or the fleetness of a horse.

Sec. 40. *Kirkpatrick vs. Bonsall*, 72 Pa. St. 155, involved a dealing in what is called futures. The court said a

bargain for an option may be legitimate and for a proper business object and added: "But it is evident such agreement can be prostituted to the worst kind of gambling ventures and therefore its character may be weighed by a jury, * * * whether the bargain was a mere scheme to gamble upon the chance of prices. * * * We must not coundound gambling * * * with what is commonly termed speculation. Merchants speculate upon the future prices of that in which they deal. * * * Their speculations display thought and forecast but they act upon their conclusions and buy and sell in a *bona fide* way. But when ventures are made upon the turn of prices alone, with no intent to deal in the article * * * the case is changed. Then the bargain represents not a transfer of property but a mere stake or wager upon its future price."

Sec. 41. In *Pearce vs. Dill*, 48 N. E. Rep. 788, it was shown that Pearce was operating a "bucket shop" and was engaged in conducting the business of selling "futures" or "options," without having on hand the products he pretended to sell and it was mutually understood and intended by both parties that the products, claimed to have been sold, were not to be delivered but when the time fixed for the delivery the market value at Chicago of such products should constitute a basis upon which the settlements should be made. As the market price would rise or fall there would be a loss or gain to the purchaser. The Supreme Court of Indiana said: "The deals or transactions were understood to be a speculation solely on chances. * * * Such transactions are of like character and akin to bets made on a game of poker or faro, and are equally as uncertain and hazardous."

Sec. 42. In *McGrew vs. City Produce Exchange*, 4 S. W. Rep. 38, the Supreme Court of Tennessee, in passing on an option deal, said: "It is now settled in this state that gaming is not confined to 'playing at any game of hazard or address for money,' etc., in the ordinary sense of these words as used in the Code S-5688; but that it is 'any agreement between two or more persons to risk money or property on a

contest or chance of any kind where one must be gainer and the other loser;' Bell vs. State, 5 Sneed, 507; Eubanks vs. State, 3 Husk. 488-490. * * * It matters not what the unlawful device is upon which the money is received as a hazard; it is gaming."

Sec. 43. In *Golden Rule vs. People*, 118 Ill. 492, it was held that where a corporation, upon the death of a member, raises a relief fund by voluntary contributions or donations of its other members, not exceeding \$2,000, seventy-five per cent of which is to be paid to a beneficiary to be named by the deceased member in his lifetime and twenty-five per cent to the members who may, by chance, hold the certificates of membership numbered next above and below that of the deceased, its business is not only that of life insurance but it is also illegal as to those taking the twenty-five per cent, it being in the nature of a wager policy.

Here we have presented a very clear distinction between what is dependent on chance and what is not. The seventy-five per cent of the fund was made dependent upon the death of the insured and that was to go to the beneficiary as compensation, in some degree at least, for the loss of the insured, while the twenty-five per cent was made payable to the members, holding by chance the certificates, numbered next above and below that of the deceased member, and hence was made dependent on chance. One was legitimate and the other a gambling transaction.

Sec. 44. Judge Grosscup in his charge to the jury in the *McDonald* case, 59 Fed. Rep. 563 made some observations, in which he undertook to distinguish a legitimate transaction from a lottery scheme. On this point he said: "Now every enterprise in which we engage has a return or prize, or is supposed to have. That is the incentive which makes men industrious and active. Whether that return or prize be determinable by mere lot or by chance makes it either a legitimate enterprise or a lottery, and therefore an unlawful enterprise. We perhaps can illustrate that best by referring to some of the schemes of life in which men are engaged. Take,

for instance, the life insurance companies, those that proceed either on the stock plan or on the assessment plan. They require of the member that he pay in a certain amount of money. That is the pecuniary consideration. That money is invested, or supposed to be invested, in securities, and when the member dies a certain amount, stipulated in the policy, is paid to his heirs or the beneficiary named in the policy. *That* is the *return*. The man may have been insured but a month and have paid in but a few dollars, and have received back \$5,000 or \$10,000. In such instances as that a much larger sum has been returned than the consideration, but the fact that there was such a return does not make it an unlawful enterprise. Why? Because the prize is not determinable by or dependent upon chance or lot. It is dependent upon the life of a man, and the life of a man is determined by the laws of nature and not by the chances of lot.

So let us take what is called tontine insurance. In that class of insurance a man pays for a term of years and then receives back his investment, having in the meantime the insurance for a certain sum fixed in the policy. Now whether the investment paid him is more or less than that, which he has paid in, the prize, that he looks to, is not simply the return of the money, but the return to his heirs or beneficiary named in the policy the amount of the policy in case he dies pending that investment. And, as in other companies, the prize may be very much larger than the pecuniary consideration paid in but it depends again upon the laws of nature, which man is not supposed to violate by taking his own life. A man who makes an investment in real estate may put in a few thousand dollars and take out a million. What he puts in is the consideration; what he takes out is the prize. It may be a hundredfold larger than what he puts in, but on what is it dependent? Upon the growth of the town in which he lives; upon the growth of public sentiment respecting the value of property in that particular locality; upon the law of growth which is itself a natural one, an industrial law. But suppose a man puts a ticket in a hat with a hundred other tickets, and then it

is drawn by a blindfolded man, and his chance of the prize offered is dependent upon that drawing. The ticket may cost but 50 cents. The prize may be worth \$10, much larger than the price of the ticket, though not larger in proportion than the life insurance policy or the real estate investment. But the getting of the prize is dependent upon the chance or lot of his ticket being drawn, not upon any natural law, as a man's life, nor upon the industrial growth as the growth of the value of real estate.

This illustrates to you the difference between legitimate investments which may yield according to the good fortune of the investor a hundredfold more than the amount invested, and a gambling investment, according to a lottery which can only yield in case the allotment or chance, which is purely artificial, turns in his favor."

Sec. 45. With all due deference to the learned judge, who delivered this charge, it is manifest that, applying the test of chance, man's ignorance of the outcome of an event, the life of an insured person is dependent on chance. So far as the insured and the insurer know, life is uncertain. It is true death is the result of the operation of natural laws but here, as elsewhere, the causes of disease and of death are unknown, so that it is impossible to predict the date of death or the length of life. If a *wager* is made dependent on the continuance of life of a given individual, there is no question, the transaction would be illegal on the ground of the existence of chance in it. The true ground of distinction between life insurance and a lottery is in the gambling or wagering feature alone. In both, as Judge Grosscup clearly shows, there are present the elements of consideration and a prize, and according to the views expressed in this work, the chance element is also present in both, just as this element is present in many legitimate transactions, but in one case there is a *wager* and in the other there is not. This is made plain in the "Option Deal" and other cases that have been before the courts. In life insurance the money is paid as a compensation for the death of the insured, while in a lottery scheme the

prize is paid as a gratuity. And reduced to its last analysis this is the only distinction that can be made between many legitimate and many illegal transactions, i. e., in one class the transaction amounts to a wager while in the other it does not.

Sec. 45a. Another good illustration of the point under review is to be found in the case of *Ferguson vs. Coleman*, 3 Richardson's Law, 99 (45 Am. Dec. 761). At the trial it appeared that the plaintiff sold the defendant a tract of land and defendant promised, in writing, to pay plaintiff \$902.58 for the land on the first day of January, 1844, if cotton should rise to eight cents a pound by the first day of November, and if not to pay \$500. Cotton rose to eight cents by the time stated. The defendant refused to take the land and pay the \$902.58 on the ground that the transaction was a wager. The Supreme Court of South Carolina disposed of this question thus: "The objection to the agreement, that it was a wager, is plainly inapplicable; for the parties had an interest in the contingency. The defendant purchased the land at the lowest price, unconditionally, but contracted to pay a larger sum if the value should be enhanced by the increased value of its product."

PRIZES DEPENDENT ON CHANCE, HORSE RACING, ETC.

Sec. 46. There is another class of cases that illustrates what is meant by offering prizes dependent on chance. These cases relate to games or contests involving elements of skill, endurance, strength, fleetness, adroitness, or knowledge, as well as elements of chance or uncertainty, as horse, foot, and boat races, dog, bull and cock fights, billiards, pool, etc. It has been held, almost without exception, that the putting up of money by two or more parties on the result of any one of the above games or contests is betting or wagering on the chances of the game or contest. That is, the payment of the money to one or the other of the parties is dependent on chance. But where an association, as a state or county fair, and the like, offers a prize to the party entering the fastest horse for a race,

or the best buggy, draft or saddle horse, for the purpose of encouraging the raising of the best breed of horses, or where an institution of learning offers a prize to the student who will write the best essay or deliver the best oration in order to stimulate mental exertion and development or offers a prize to the winner in a foot or boat race in order to encourage physical development, then such prize is not dependent upon chance in the sense of gaming or gambling but upon the speed or other qualities of the horses entered, or upon the mental vigor and attainments or the physical development of the students. But if parties should put up money on any of these legitimate contests for prizes for the mere risk of getting a larger sum, and one of the parties must be loser and the other gainer, the transaction is a wager upon the chances of the contest alone. That which differentiates a legitimate contest for a prize and illegitimate contest in this class of cases is the intent with which the prize is offered. In one case the parties do not gamble, while in the other they do. If this test be applied little difficulty will be found in distinguishing what is moral and legal and even praiseworthy from what is wrong, illegal and demoralizing to individuals and society.

Sec. 47. In *Hankins vs. Ottinger*, 115 Cal. 454, 40 Law. Rep. Ann. 76 the Supreme Court of California held that "competing for premiums offered by an association on horse races is not competing for bets or wagers and an agreement between two owners of horses to pool all premiums and stake moneys awarded on their horses and to divide the same equally is valid. The payment of entrance money to an association as a fee for the privilege of competing in a horse race and the adding of this entrance money to the premium to be divided equally between the first, second and third horses in the race, did not tend to impart to the transaction the character of a wager between the competitors. After citing the case of *Alvord vs. Smith*, 63 Ind. 58, the court goes on to say: "There is a clear distinction," says the Supreme Court of Judicature of

Indiana, in *Alvord vs. Smith*, *supra*, 'between a wager or bet and a premium or reward. In a wager or bet there must be two parties and it is known before the chance of uncertain events upon which it is laid is accomplished, who are the parties who must either lose or win. In a premium or reward there is but one party until the act or purpose for which it is offered has been accomplished. A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event. The two need not be confounded.' "

Sec. 48. It was held in *Alvord vs. Smith*, 63 Ind. 58, that a premium offered by an authorized corporation or a private partnership to the owner of the horse that should make the best and quickest time, or exhibit a certain rate or speed in a proposed trial of speed of horses, is not a bet or wager.

In *Porter vs. Day*, 71 Wis. Rep. 296, the court held that the mere racing of horses is not illegal or against public policy and where a premium or reward is offered by a third party, in good faith and not as a cover for betting, to the winner in such race, the latter may recover the premium, even though he paid an entrance fee, which went in part to make up the premium. The court, however, remarked, *arguendo*, that if it should be shown that the offering of the prize was a mere subterfuge for betting on a horse race it would come under the law prohibiting betting and gaming, and cited the case of *Gibbons vs. Governor*, 1 Denio, 170, where it was held that if two or more men, owning horses, should contribute equally or otherwise a sum for the purpose of offering it as a prize or premium to themselves only and to the owner of the horse who should win the race, such a transaction came within the rule prohibiting betting and gaming.

The offering of premiums or purses by Fair Associations for the fastest horse is not gaming and not illegal. *Ballard vs. Brown*, 67 Nev. 586.

The deposit of an entrance fee to enable the depositor to compete for a prize in an athletic contest is not a bet. *Costello vs. Curtis*, New York Supreme Court, 1881, 13 N. Y. Weekly Dig. 20.

Sec. 49. But if there be a statute which prohibits horse racing for reward and also the contributing or collecting of money or property for the purpose of making up a purse, plate or prize, then the entrance fees and subscriptions are illegal and void.

Bronson Agricultural, etc., Ass'n vs. Ramsdell, 24 Mich. 441; Comly vs. Hillegrass, 94 Pa. St. 132, (39 Am. Reps. 774).

In the Michigan case the court said: "Now it is very clear that the racing of the horses on the occasion alluded to, under the regulations of this association, and the premium given to the owner of the winning horse, as well as the mode of raising that premium, come directly within the express prohibitions of this Statute. It is none the less a race because the association chose to designate it a 'trial of speed,' and pretend to give the premium for the best horse, when the trial of excellence is determined by the greatest speed. The 'premium' is but another name for the purse, 'stakes,' or reward, to the owner of the animal which shall excel in speed; 'and the mode of raising this purse, stakes or reward comes within the express prohibitions of the third section.'"

In the Pennsylvania case the court held that a check, given to an agricultural society to enable the drawer to enter his horse in competition in a "trial of speed" at an exhibition for a premium offered by the society, was void under the statute of the state against wagers and horse racing.

In *Palmer vs. State*, 13 S. W. Rep. 233, the Supreme Court of Tennessee held that betting money in an authorized horse race was gambling, citing, in support thereof, *Huff vs. State*, 2 Swan, 279. The court there refused to pass on the question whether pool selling on horse races was a lottery, because it was not necessary to decide it.

These are the leading cases on the question of offering a purse or premium for the fastest or best horse in contests of strength or speed and the cases which involved the element of an ordinary wager on horse races will now be considered.

Sec. 50. The Statute of Kentucky prohibited anyone, under a penalty, from engaging "in any hazard or game on which money or property is bet, won, or lost." In *Cheek vs. Commonwealth*, 37 S. W. Rep. 152, the Court of Appeals of that State, in construing this Statute, said: "Is it, therefore, unlawful to bet on a horse race? * * * While a horse race has been held, in some of the states, to be 'a game or gambling device,' manifestly the word game, as used in our Statute, was not meant to embrace such a race and the sole question to be considered is what is meant by a 'hazard.' It seems to us, beyond question, that to engage in a wager of any kind is a hazard within the meaning of that word, as it is used in the Statute. A and B may play a game of cards for amusement and if C and D stand by and bet on the game, the players may be innocent, but the bystanders are guilty; not because they engage in the game, but because they wager in a hazard on which money is bet. Those who enter the horses for the race and the riders may be ever so innocent and will be unless they engage in betting on the race, although they are actually engaged in the race; but the bystander is guilty, without engaging in the race, if he engages in the hazard of betting on the result. Such was the construction given by this court of a similar Statute in *Clark vs. Com.* 79 Ky. 359."

Sec. 51. In *People vs. Weithoff*, 51 Mich. 203 (47 Am. Reps. 557) defendant, Weithoff, kept rooms in Detroit, Mich., in which he kept lists and boards, for the purpose of selling Auction and Combination pools and Paris mutuals on horse races and base ball games, and Judge Cooley, delivering the opinion of the court, said:

"In the common usage of the two terms 'betting' and 'gaming' they may sometimes be employed interchangeably but not always. If two persons play cards for money they are said to be gambling or gaming; but they are gambling because they lay a wager or make a bet on the result of the game and therefore to say they are betting is equally appropriate. If two persons lay a wager on a pending election, it will be said they

are betting, but not that they are gaming. There is no gaming in which the element of a wager is wanting, but there is betting which the term 'gaming' is not commonly made to embrace. But the mischievous element against which the Statute is aimed is present in all betting where money or other valuable thing is staked, and no violence is done to language when all such betting is classed as gaming, as manifestly it sometimes has been in our legislation and to some extent always. * * * Neither do we think it would be deemed an inaccurate or inappropriate use of language if all betting for money were to be spoken of and considered as gaming or gambling. It is so common for persons accustomed to speak with accuracy and propriety to apply one or the other of these terms to any species of immoral betting that we learn the application intended and the precise meaning in any particular case only from the connection. Often we find the terms 'gaming' and 'gambling' applied to transactions which are not illegal in the sense of being immoral, but which involve the element of wager as in the case of option contracts. * * * That the pooling schemes contemplated putting money at stake upon the issue of games is not denied. They had in view base ball games, which are games in the strictest sense, and also horse races. These last have often been held games, within the meaning of the statute of Anne, when made for wagers. *Goodburn vs. Marley*, Str. 1159; *Blaxton vs. Pye*, 2 Wils. 309; *Grace vs. McElroy*, 1 Allen, 563; *Tatman vs. Strader*, 23 Ill. 493; *Mosher vs. Griffin*, 51 Id. 184; *Ellis vs. Beale*, 18 Me. 337 (37 Am. Dec. 726); *Cheesum vs. State*, 8 Blackf. 332; *Wilkinson vs. Tousley*, 16 Minn. 299; *McLain vs. Huffman*, 30 Ark. 428. So have been dog fights (*Eagerton vs. Furzeman*, 1 C. & P. 613), and foot races (*Lynall vs. Longbothom*, 2 Wils. 36), and cock fighting (*King vs. Howel*, 3 Keb. 465; *Squires vs. Whisken*, 3 Camp. 140; *Bagley vs. State*, 1 Humph. 486; *Johnson vs. State*, 4 Sneed, 614; *Commonwealth vs. Tilton*, 8 Met. 232). * * * The word 'games' is very comprehensive, and embraces every contrivance or institution, which has for its object to furnish

sport, recreation or amusement. Let a stake be laid upon the chances of the game, and we have gaming. Eminent judges have thought the pooling scheme was to be considered a game. *Tollett vs. Thomas*, L. R., 6 Q. B. 514; *Scollans vs. Flynn*, 120 Mass. 271-3; and it was so decided in *Edwards vs. State*, 8 Lea, 411. It does not furnish sport, recreation or amusement, except so far as the excitement of the choice of chances may furnish it; but this is true of many contrivances, which are always called games and which the law aims to suppress. There is no good reason for a distinction between pooling and such games."

Sec. 52. The Court of Appeals of the First District of Illinois in *Swigart vs. The People*, 50 Ct. App. Reps. 181, in 1892, held that selling pools on horse races was selling pools on a "game."

In *Bamble vs. State*, 63 Md. 242, it was held by a divided court (four to three) that the selling of cards and tickets at a "mutual pool" on horse races is not keeping a gambling table under the Maryland Statute, because the purchasers did not bet their money on a game of chance.

Sec. 53. In *Com. vs. Simonds*, 79 Ky. 618, it was held that pool selling on a horse race was wagering on a game of chance, and cited *Tollett vs. Thomas*, L. R. 6 Q. B., 415, in support. It was also held that the keeper of the pool room did not bet as he lost nothing—he simply got 5 per cent of the money paid in. The outsiders lost the money.

Sec. 54. In *State vs Shaw*, 39 N W Rep. 305, the Supreme Court of Minnesota held that horse racing is a game and betting on a horse race is gambling which the court defines to be "risking of money or other property between two or more persons on a contest of chance of any kind where the one must be the loser and the other the gainer"

Sec. 55. In *Tatman vs. Strader*, 23 Ill. R. 439, it was held that horse racing was a game, within the meaning of the Illinois Statute which provided that anyone might recover back money won from him "at any gaming or playing at cards, dice or any other game or games."

The Court cites *Clayton vs. Jennings*, 2 Blackst, 706, where it was held "that betting on a horse race was betting on a game, and unlawful and void, although the game itself was not unlawful." The English court in the latter case said: "And Ashton, J., mentioned the case of *Cannon vs. Quick*, in the King's Bench about ten years ago, when the court took a distinction between running a horse for (fifty pounds) £50, which was unlawful, and betting on the side of the horse which was not so."

Sec. 56. In *Harlen vs. U. S.*, 1 Morris (Iowa), 169, the court said: "It is said a horse race is not only uncertain in its results, but it is often dependent upon accident. So is almost every transaction of human life but this does not render them games of chance. There is a wide difference between accident and chance. The one is intervention of some unlooked for circumstances to prevent an expected result, the other to the uncalculated effect of mere luck. The shot discharged at random strikes its object by chance, that which is turned aside from its well directed aim by some unforeseen circumstances misses its mark by accident. In this case, therefore, we reasonably feel disappointed, but not in the other, for blind uncertainty is the chief element of chance. In fact, pure chance consists in the entire absence of all means of calculating results, accident in the unusual prevention of an effect materially resulting from the means employed. That the fleetest horse sometimes stumbles in the race course and leaves the victory to its more fortunate antagonist is the result of accident, but the gambler whose success depends upon the turn of the cards or the throwing of the dice trusts his fortune to chance. It is said there are strictly few or no games of chance, but that skill enters as a very material element in most or all of them. This does not, however, prevent them from being games of chance within the meaning of the law. There are many games, the result of which depends entirely upon skill. Chance is no wise resorted to in these. Such games are not prohibited by the Statute. But there are other games, which, although they call for the exercise of such skill, there is an

intermingling of chance. The result depends, in a very considerable degree, upon sheer hazard. These are the games against which the Statute is directed and horse racing is not included in that class."

PRIZES DEPENDENT UPON LOT OR CHANCE; MISCELLANEOUS CASES.

Sec. 57. Only a few of the miscellaneous cases in which the question when money or property is made dependent upon lot or chance will be examined.

Sec. 59. In *Murphy vs. Rogers*, 24 N. E. Rep. 35, it was held by the Supreme Judicial Court of Massachusetts that playing billiards or pool where the defeated party was to pay for the use of the table or implements used in playing or for liquors or cigars to be used by the prevailing party amounted to gaming within the meaning of a Statute which provided that all notes, given for money or goods, won at gaming, shall be void as between the parties. In support of this proposition, the court cited *State vs. Leighton*, 23 N. H. 167; *State vs. Book*, 41 Iowa, 550; *State vs. Manser*, 7 Iowa, 406; *Ward vs. State*, 17 Ohio St. 32; *Walker vs. State*, 2 Swan, 287; *Com. vs. Taylor*, 14 Gray, 26; and *Com. vs. Gourdin*, Id. 390.

Sec. 60. In *Re Lee Tong*, 18 Fed. Rep. 253, Judge Deady, remarked: "The coin of the —, when used to play games of 'mabee' 'heads or tails,' 'odd or even,' for money or other thing of value; a long and short straw when used to play the game of 'draw straws' for the same purpose; a wheel of fortune or a 'Grab Bag' when used at church fairs or festivals or elsewhere to dispose of articles of value upon the chance of getting something for comparatively nothing, are each and all of them so far just as much gambling devices as cards or dice can be. In short anything which is used as means of playing for money or other thing of value so that the result depends more largely on chance than skill is so far a gambling device."

Sec. 61. In *State vs. Debay*, 23 S. E. Rep. 167, the Supreme Court of North Carolina held "that the putting up by each of several persons of a piece of money and the deciding by

throwing dice which of such persons should have a certain turkey constitutes a game of chance." The court remarked "it must be noted that this decision has no application to the long prevailing custom of shooting for beef, shooting at turkeys and other similar trials of skill. It is true, that there each participant pays for the privilege or so-called chance of shooting for the prize; but there is no chance in the sense of the acts against gambling. These are trials of skill which the law has never discouraged and not games of chance in any sense. Nor does the Statute prohibit the social diversions in which the hostess offers prizes for the most successful players at cards or other games. Those are not games of chance where the players bet nothing. They lose nothing, if unsuccessful and pay nothing for the chance of winning."

Sec. 62. In *Hamilton vs. State*, 25 Ind. 426, the court said: "We think that sound reason supports the authorities that hold such playing as is charged (pool or billiards) in this case to be gaming. The manifest purpose of the legislature in its various enactments on the subject of gaming has been to make unlawful all games of chance by which money or other article of value may be lost or won, and the evil effects of risking small sums on the result of skill at billiards is less in degree only than the hazard of larger stakes at other games."

To the same effect is *Alexander vs. State*, 99 Ind. 450. There the loser at the game of billiards had to pay the keeper of the table. The court said: "At the end of each game he, (the winner), was ten cents better off than if he had lost the game, and he was five cents better off than he would have been, if without any chance or hazard, each party had paid for his cue."

Ses. 63. In *Wortham vs. State*, 59 Miss. 179, the court, holding that billiards is not a game of chance, said: "It may be true that, in the playing of all games, there is to a greater or less degree an element of chance in the sense that an unexpected result follows the peculiarly skillful or negligent act of the player, but this is not the chance which brings the game within the condemnation of the statute, for in such cases

the chance, or more properly the accident, occurs occasionally and is not inherent in the game. The games included in this statute, we think, are those only in which the game itself is decided or some advantage therein is lost or gained by the player or some third person doing an act which is required by some rule of the game to be done, the result of which is determined by chance and not by the skill of the actor and which is required to be done because of the accidental character of its consequences, to the end that chance may enter as an element in the game. It is the character of the game and not the skill and want of skill of the player, which brings it into or excludes it from the prohibition of the statute."

Sec. 64. The difference between games of chance and games of skill was discussed pretty fully in *State vs. Gupton*, 8 Ired. (N. C.) L. 271. The defendant was indicted for playing a game of ten pins under a statute of North Carolina, making it a criminal offense to play a game of chance at any gambling table. The court held that the statute, having used the words "game of chance," should not be made to include games of skill. The court said, "therefore, it is apparent that those games are specified in contradistinction to other games, which are not games of chance. In other words, those terms must be understood in their plain, popular sense, as descriptive of a certain kind of games of chance in contradistinction to a certain other kind, commonly known as games of skill. Though our knowledge on such subjects is very limited, yet we believe that in the popular mind the universal acceptance of a "game of chance" is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all or are thwarted by chance. As intelligible examples the games with dice are determined by throwing only, and those in which the throw of the dice regulates the play, or the hand at cards depends upon a dealing with the face down, exhibit two class of games of chance. A game of skill, on the other hand, is one in which nothing is left to chance; but superior knowledge and attention, or superior strength, agility and practice gain

the victory. Of this kind of games, chess, draughts or chequers, billiards, fives, bowles and quoits may be cited as examples. It is true that in these latter instances superiority of skill is not always successful—the race is not necessarily to the swift. Sometimes an oversight, to which the most skillful is subject, gives an adversary the advantage; or an unexpected puff of wind or an unseen gravel in the way may turn aside a quoit, or a ball and make it come short of the aim. But if those incidents were sufficient to make the games, in which they may occur, games of chance there would be none other but games of that character. But that is not the meaning of the statute, for as before remarked, by the very use of those terms, the existence of other kinds of games, not of chance, is recognized. The incidents mentioned whereby the more skillful may be the loser are not inherent in the nature of the games. Inattention is the party's fault and not his luck, and the other obstacles, though not perceived nor anticipated, are occurrences in the course of nature and not chances. They are indeed sometimes inaccurately called so, as one hears chances of war used to excuse losses by means not foreseen but which might, and though out of the usual course of things, ought to have been foreseen and provided against. For the art of war is surely a science and the results of certain powers, movements and combinations may be almost mathematically calculated. In the same manner, comparing small things with great, there are games of skill, purely such, although the better player may, in particular instances, fail to win through the want of attention or energy and not the blindness of chance. In that sense ten pins, as understood by us from the description in the case, is not a game of chance but of skill. Nothing is referred to chance; but as in billiards, a just estimate of distances and angles, steadiness of hand and a due application of strength constitute, under ordinary circumstances, the judicious and successful player."

Sec. 65. Wagers have been laid upon the sex of a child expected to be born, *DeCosta vs. Jones*, 2 Cowp. 729; upon the future amount of the public revenues, *Atherford vs. Beard*,

2 Tenn. Rep. 610; upon the non-marriage of a party within a certain time, *Hartley vs. Rice*, 10 East 22; upon a question of law, *Henkin vs. Guerss*, 12 East 247; upon the death of a certain person at a particular time, *Gilbert vs. Sykes*, 16 East 150; upon the particular carriage a certain person will travel in, *Eltham vs. Kingsman*, 1 Barn. and Ald. 683; upon the conviction of a certain person on trial on a criminal charge, *Evans vs. Jones*, 5 Mees. and W. 82; upon how a prohibited game should be played, *Brown vs. Leeson*, 2 H. Black. 43; upon the reversal or affirmance of a decree in chancery by the House of Lords, *Jones vs. Randall*, 1 Cowp. 37; upon the purchase or non-purchase of a wagon by a third party of a fourth, *Good vs. Elliott*, 3 Term Rep. 693; upon the name of a person the parties had seen, *Bland vs. Collett*, 4 Comp. 157; upon the question whether one of the parties was older than the other, *Hussey vs. Crickett*, 3 Comp. 168; upon which of two persons would die first, *Earl of March vs. Pigot*, 5 Burr 2802; and upon the result of elections in innumerable cases; note to *Bernard vs. Taylor*, 37 Am. St. Rep. 702.

Sec. 66. A most intelligent and exhaustive discussion in regard to the nature of chance is to be found in the opinion in *Goodman vs. Cody*, 1 Wash. T. 329. The Statute of Washington Territory provided that a verdict might be vacated "whenever one or more of the jurors shall have been induced to assent to any general or special verdict other and different from his own conclusions and arrived at by a resort to the determination of chance or lot." In the case above cited it appeared that a verdict was reached in this way: By agreement among the jurors they severally set down on paper the amounts they respectively thought fit and the sum of these amounts, divided by the number of jurors, was the amount of their verdict. Greenc, Associate Justice, delivering the opinion of the court, said: "What is chance? It is said by a learned judge in a case cited (*Turner et al. vs. Tulumne County Water Co.*, 25 Cal. 402), that a verdict found by average can not be called chance, because derived from sums, the result of intelligent action of individual jurors by means of the

most accurate of the sciences. But for all the exact science had to do with the matter, he who gave the opinion might as well have held that were twenty dice cast, and the sums turned up added together, the aggregate divided by twelve and the quotient taken for a verdict, such a verdict would not be got by determination of chance, because got by the most accurate of sciences. The learned judge erred doubly: First, he overlooked the fact the verdict is already determined and fixed as soon as the twelve sums are ascertained, and before the exact science is applied within the maxim *Id certum est, quod certum fiat*; and second, he evidently mistook the nature of chance, falsely fancying that what is certain in result or is brought about by known or intelligent agencies can not be said to result from chance. * * * The word chance has not been adopted or defined as a law term, is not technical and must be deemed used by the legislature in the popular sense. According to the generally accepted and ordinary use of the word anything is said to have happened by chance to anyone, which was neither understandingly brought about by his act, nor pre-estimated by his understanding. If one move his arm inconsiderately and by the movement unintentionally break a crystal vase, we may say he did it by chance; for his intelligence did not from step to step estimate or direct the action to its result. Yet, although the result was a chance one, it was the certain, inevitable result of assured relative positions of the arm and the vase, and the muscular action, perhaps voluntary, of the former. Again, when a die is thrown, the position in which the die will fall is a necessary effect from well known but unestimated causes by the original position of the die, its size, form and weight, the manipulation given it, the distance and velocity of the throw, the sort of surface it falls upon, and perhaps other things; the final position of the die is determined with the mathematical certainty, and may, by any painstaking mathematician possessed of the elements of the problem, by the use of the most accurate of the sciences, be calculated with infallible precision. Still we say, and properly say, that the final position of the die is determined by

chance; and by this we mean, not that the result of the throw was uncertain or a consequence of unknown causes, but that it was produced by causes, the efficient and proportionate operation of which was, in fact, by the person to whom it chanced neither estimated nor intelligently controlled for the accomplishment of the result. With the same propriety, we speak of meeting by chance a person at a certain place at a certain time; and thus no matter how exactly we have precalculated and intended being ourselves at that particular time nor how exactly that person may have precalculated and intended being at the same place at the same time likewise, provided we, to whom the chance happens, did not precalculate nor consciously bring about the meeting then and there.

“From the popular use of the word ‘chance’ as illustrated in these examples, it seems plain to us that a juror resorts to the determination of chance for a verdict, whenever he resorts to any method, the steps and results of which are beyond his calculation and unfollowed and unparticipated in by his understanding and all the jurors resort to such a method when they resort to the method of average. With a verdict got fairly as between the jurors, by such a method, the conclusion attained by the intelligence of any one juror never coincides, unless the average of the conclusions of all the jurors happens to be identical with his own; whereas, in a good verdict, every element of chance is eliminated by the fact that before the verdict is complete, every intelligence on the jury, being first well apprised of the action of the others, has, by its own individual conscious action, ratified and arrived at the same conclusion with every other. In a verdict got by the method of average every sum that goes to develop the verdict is a chance sum as to each juror, save the sum the juror himself sets down; and the verdict is not redeemed from being a chance verdict as to each juror, and therefore chance as to all, by the fact that each has contributed to it an element not of chance any more than a dice thrown would be redeemed from being chance by the fact that the throw was in part controlled by certain intentional motion of the dice box.”

Sec. 67. The cases in regard to wagers in general have been reviewed and cited thus extensively for the purpose of presenting the views of the various courts on the question of chance and what it is to make the payment of money dependent upon chance. In many of these cases statutory provisions had a controlling influence. But one can not read the opinions of the courts on this subject without being impressed with the proposition that chance, after all, consists in our ignorance of the event upon which a wager is laid, rather than upon anything that inheres in that event itself. If a man does not know whether an event will turn out one way or the other and he stakes money on it, as to him the event will happen by chance, because it is brought about without his will or choice.

Sec. 68. In the review of these cases a distinction must be made between those where the party wagered his money upon some act to be performed by himself and those where the result depended upon the act of another person or upon the act of a dumb brute which was to be controlled by another person. In the former cases the bettor may, very well, be regarded as entering the contest with another motive than the mere winning of money and as feeling that the result depends largely on his own effort, while in the latter cases he stakes his money not on his own ability to bring about the result according to his will but simply on his *opinion* of what another person or some animal can do. A boy playing marbles for "keeps," a marksman at a shooting match for beef, turkey or other prize, and a party entering a foot or boat race or some athletic contest care less about what is to be won than the glory of becoming a champion. It is not to be inferred from what is here said that a party may not be guilty of gambling upon an event to bring about which he personally participates in the contest but these observations are intended to point the distinction in the two classes of cases above mentioned. The distinction is broad and wide between what a party may do and what he *thinks* another can or will do and especially what

he thinks a horse or other animal under the control of a third person can do.

It is important to keep this distinction in mind in the review of the foregoing cases because in many of them the parties staked their money on the result of games or contests in which they personally participated.

These cases, involving ordinary wagers, have been reviewed for another purpose and that is to show what a wager is, because that is not only a very important but an essential element of a lottery scheme and one can not escape the conclusion that if this fact had been kept steadily in mind by the courts the results in some of the cases would have been different.

NON-ESSENTIALS OF A LOTTERY SCHEME.

Sec. 69. Having ascertained and stated the essential elements of a lottery scheme, what is not essential in such a scheme will now be briefly stated.

1. In order to constitute a scheme a lottery or similar enterprise it is not necessary that it should specify the method by which the award of the prizes should be made.

In *Wooden vs. Shotwell*, 23 N. J. L. (loc. cit.) 470, it was held that the chance element inhered in a scheme for the sale of lots of land, though the contract provided that the prize lots should be awarded in the manner to be agreed upon by the parties interested, i. e. by the adventurers.

In *Thomas vs. The State*, 59 Illinois, 160, the court held a scheme for the distribution of \$200,000 in presents "in a just and legal manner" to be a lottery.

It was urged in defense of this scheme that no plan of distribution of the prizes had been determined upon; that the purchasers were to receive certain articles "in a just and legal manner" and that a plan might at the proper time be devised, which would neither violate the law nor contravene good morals. In reply to this contention the court said: "The distribution was to be in a just and legal manner. It should then be in an honest, upright and equitable mode. There

should be perfect fairness and equality. This plan would be utterly violated, if any one of the numerous purchasers should fail to receive a prize. The distribution could not be in a just and legal manner, unless the number of the purchasers was the same as the number of the prizes and the prize received proportional, as nearly as possible, to the amount of money paid."

And so in *Lynch vs. Rosenthal*, 42 N. E. Rep. 1103; 31 Law Rep. Ann. 835, it was held by the Supreme Court of Indiana that in a town lot scheme, the chance element inhered in the award of the "prize lot," though the contract provided it should be given away and should be awarded in some manner to be agreed upon by the parties interested.

And in England the same rule prevails. In *Morris vs. Blackman*, 2 H. and C. 912, where presents were to be "impartially divided among the audience and given away," the scheme was held to be a lottery.

In *McLanahan vs. Mott*, 73 Hun. 131, \$400,000 was to be set apart at each semi-annual payment of interest to redeem bonds to be designated by a named trustee at their maturity value. The other elements of a lottery being found to be present the court held the scheme a lottery.

2. It is not necessary that there should be any blanks. In many of the cases, which will be hereafter reviewed, every investor received something of value, but the articles distributed were either not of the same kind or not of the same value.

3. It makes no difference whether the investors get all their money back or not, if prizes are given by lot or chance to some and not to others. This was specifically decided in the *Horner* case. 147 U. S. 449.

4. It is not necessary that there be any drawing by the promoter, oftentimes the investors doing the drawing.

5. It is not necessary that there should be tickets. This will appear in the most of the guessing contests. The tickets may be in the form of bonds as in the *Horner* and *Bond*

Investment cases hereafter cited or in the form of coupons, or keys, etc., etc.

Sec. 70. A lottery may exist even where there are no blanks. Some of the courts have said that a lottery is a scheme in which all except the prize tickets are blanks. In a sense this is incorrect. In many of the schemes that have been adjudged lotteries by the courts apparently there were no blanks, for all investors drew something of value; and yet in a certain sense there are blanks in all lotteries. While the scheme may be such, that all investors draw something of value, yet that something, very frequently, does not constitute a prize, for the simple reason, that it is not of the same value as, but of less value than the amount invested, and in such case it would be in line with the exact truth to say that some of the investors draw blanks. Take the Horner case for an illustration. All holders of the Austrain bonds in that case were guaranteed the amount of money they invested, with interest, soon or late, but at the periodical drawings some of the numbers drawn entitled the holders of certain bonds, not only to the principal and interest of the bonds, but also to prizes ranging in amount from 400 florins to 250,000 florins. The holder of a bond, who drew the lowest prize of 400 florins, could not be said to have drawn a blank, though another more fortunate adventurer, in the same enterprise, may have drawn a prize of 250,000 florins. Both drew prizes, that is they both received more than they invested. The adventurers, however, whose bonds were not drawn for payment, with a bonus, may very well be held to have drawn blanks, at least for that particular drawing. They retained, nevertheless, their chances for prizes in the future drawings. The same may be said of the so-called Bond Investment schemes. At stated periods, according to these schemes, certain bonds were reached and paid, with large profits, constituting prizes, while the holders of the other bonds failed to get anything, but the latter, so long as they continued to pay their dues, retained chances for prizes in the future. But there are other cases where there seem to be no blanks

and the courts have gone so far as to say, in some of them, that there were no blanks. Take the cases of *Seidenbender vs. Charles*, 4 Serg. and Rawle, 151 (8 Am. Dec. 682), and *Dunn vs. The State*, 40 Illinois, 465, as illustrating this class of cases. In *Seidenbender vs. Charles*, each adventurer drew a lot of land but the scheme was held to be a lottery, because the lots were of *unequal* value, some being worth much more and some much less than the uniform price, which each adventurer was required to pay. Tilgman, Chief Justice of the Supreme Court of Pennsylvania, on this point, remarked: "If it be said that in this case there are no blanks, I answer that no material difference arises from that circumstance. Some of the most fraudulent lotteries ever known have been those in which there were no blanks. They are an imposition on the folly of mankind; for of what importance is it, if a man who pays a considerable sum for a ticket has a prize of very little value?"

In *Dunn vs. The People*, 40 Illinois, 465, prizes, ranging in value from a cheap trinket to a grand piano, were offered to the public. There every adventurer drew something and yet the scheme was held to be a lottery on the ground that the prizes were of *unequal* value. The Supreme Court of Illinois denounced this scheme in the following language: "If it differs from ordinary lotteries, the difference is chiefly in the fact that it is more artfully contrived to impose upon the ignorant and credulous, and is, therefore, more thoroughly dishonest and injurious to society."

CHAPTER III.

A review of the schemes, supposed to have been lotteries, which have been before the Courts and the Postoffice Department.

Sec. 71. The various schemes which have been before the courts and the Postoffice Department and which it was claimed contained all the essential elements of a lottery scheme will now be examined and reviewed in order to illustrate and elucidate the principles discussed in the last chapter. It is not deemed necessary or prudent even to undertake to explain the methods adopted by the operators of regular or avowed lotteries in the collection or distribution of money for in such lotteries all the essential elements of a lottery are to be found. The prime object of this work is to enable the courts and the postal officials and other interested parties to reach just conclusions in regard to those schemes, which appear under alluring names and are ingeniously devised to deceive the public and prevent detection. A gambler infinitely prefers to advertise a scheme that he can call a lottery, because he knows that the public regards the distribution of prizes by a drawing as the fairest that can be adopted. In an avowed and regular lottery, honestly conducted, every adventurer feels he has a fair chance to win the prize, but this is not so in the numerous enterprises, which, while retaining all the elements and evil tendencies of a lottery scheme, seem to have eliminated from them the safeguards which the people desire. If lotteries are to be operated, it is infinitely better that they should be under government supervision, so as to guaranty honesty in conducting them. But the policy of our country is unalterably fixed for the suppression of all lottery gambling so far as laws can accomplish that result. This is attested by the constitu-

tions and laws of all the States and by the laws of Congress. One fact is settled and that is no more lotteries are to have the sanction of law in the United States. In order, therefore, to meet the demand for that kind of gambling, irresponsible and oftentimes dishonest promoters present to the people gift enterprises, gift-concerts and other schemes under false disguises and are unable or unwilling to award the prizes they offer to the legitimate winners. These promoters can, in the most of cases, if they choose, either fail to award the prizes at all or award them to someone who is on the ground floor with them. The contest, whatever it may be, can be determined and the party, who is to receive the prize, ascertained before the scheme is advertised and the adventurers would have no means of detecting the fraud. But it seems the gambling spirit is so strong in some people that they are willing to invest and do invest money in the wildest and most preposterous enterprises.

This review of lottery schemes will not include the methods of the Louisiana or other regular lotteries, but will include only gift enterprises and other schemes which do not bear the name of lottery but which were supposed to be lotteries or in the nature of lotteries.

GIFT CONCERTS AND GIFT ENTERPRISES.

Sec. 72. "A. Gift Enterprise, in common parlance, is a scheme for the devision or distribution of certain articles of property, to be determined by chance, among those who have taken shares in the scheme." *Anderson's Law Dictionary*, 488.

This definition is scarcely broad enough to embrace all schemes which may properly be termed gift enterprises. A definition more nearly correct should be formulated thus: The transfer of rights of independent value in money or property, together with the right, in consideration of the payment of value, to a chance for a prize, may be called a gift enterprise.

And the Supreme Court of the United States in the Horner case held that a gift enterprise was similar to a lottery or a gift concert and was therefore embraced within the Anti-Lottery Act of Congress.

Sec. 73. Gift Concerts and Gift Enterprises, to constitute gambling or lottery schemes, must contain an element of chance. It is true that in these schemes, the adventurers receive what is equal, or at least what is held out by the promoters to be equal in value to what they invest and hence to that extent there is an element of certainty in them but every gift concert or gift enterprise in the nature of a lottery must also have in it an element of chance; that a prize, in addition to the thing sold, must be awarded by chance.

The Supreme Court of the United States, in the Horner case, 147 U. S. 449, in construing the Anti-Lottery Act of Congress, in its application to the issue of the Austrian premium bonds, said: "What is called in the Statute a so-called gift concert has in it an element of certainty and also an element of chance; and the transaction embodied in the bond in question is a similar enterprise to lotteries and gift concerts."

Judge Beatty in the case of U. S. vs. Wallis, 58 Fed. Rep. 942, construing the same act, said: "It is well settled that so-called gift enterprises and all similar schemes, in which each purchaser of a ticket is given something of value equal to its cost, when connected with a drawing by chance for prizes to be received by some and not others, are lotteries."

Sec. 74. In *Long vs. State*, 74 Md. 565, Long was indicted for violating Sec. 185, Art. 27 of the Maryland Statutes, which prohibits anyone to sell wares, goods or merchandise holding out as an inducement "any scheme or device by way of gift enterprise of any kind or character whatever." Long kept a store, and displayed in his show window a number of packages of "Bonanza Coffee" and pieces of crockery ware and a notice or card to this effect: "A piece of this crockery ware given with each pound." Each package of coffee had round it a slip, blank on the outside but on the

inside was printed the name of some article of crockery to which the purchaser of the package was entitled.

When the case was first before the Court of Appeals of Maryland, 73 Md. 527, it was held that this scheme was a gift enterprise and unlawful, but when the case was again appealed, the court held that the scheme did not involve the element of chance and hence, that the above cited act, so far as it related to gift enterprises not involving chance, was invalid and Long was discharged. As the articles distributed to the purchasers of coffee were of different kinds and, presumably, of different values, this last ruling seems to be in conflict with a long line of decisions. The ruling is certainly not supported by the case of *People vs. Gillson*, 109 N. Y. 389, upon which the court seemed to mainly rely. There the purchaser of two pounds of coffee had the privilege of choosing any article of crockery or glass ware from a lot of such articles in plain view of the public. The court said: "A counter had upon it various articles of crockery all of which were in full view of the purchaser at the time he purchased the coffee in question. He was told that he could have any of the articles on the counter, to be picked out by himself, if he purchased two pounds of the coffee mentioned." The court held, and rightfully too, that the scheme was not a lottery. Nor is the Long case sustained by the *Commonwealth vs. Emerson*, 165 Mass. 146.

Sec. 75. There the construction of the Massachusetts Act of 1884, c. 277, was involved. That act provided that no person should sell, exchange or dispose of any property or offer or attempt to do so upon any representation, advertisement or inducement, that anything, other than what was specifically stated to be the subject of the sale or exchange, was to be delivered or received or in any way connected with it as a part of the transaction.

Defendant, a retailer of tobacco, displayed in his window a large number of photographs of distinguished or notorious men and women, with the advertisement that each purchaser

of a piece of certain tobacco was entitled to one of these photographs, he to make his own selection.

The court, construing the words of the statute, said: "They were not intended and do not purport to forbid a sale of two things at once, even if one of them is the principal object of desire and the other an additional inducement which turns the scale. But the aim of the statute is to prevent offers of bargains which appeal to the gambling instinct and induce people to buy what they do not want by the promise of a gift or prize, *the precise nature* of which is not known at the moment of making the purchase. There was nothing of that sort in the present case. All that was sold was "specifically stated to be the subject of the sale" and we think it very plain that, if the offer of a single photograph with the tobacco would have been lawful, the offer of a choice out of a number is no less so, the buyer being free to make his choice before he takes the tobacco."

But in the Long case each package of coffee had on it a slip, blank on the outside, but on the inside was printed the name of the article of crockery ware to which the purchaser was entitled. The purchaser did not have a choice of the article he desired but it came to him by chance, and hence according to all the authorities the scheme was an enterprise similar to a lottery.

Sec. 76. There is no question that a scheme similar to a lottery or so-called gift-concert, offering prizes dependent on lot or chance, includes bazaars, or church fairs, though held for the purpose of raising money for a charity, where the competitors pay a specified sum of money each, and then articles of unequal value are distributed among them by a raffle or drawing, every competitor getting something for his money. Such a scheme also includes the modern institution called a "fish pond," in which a quantity of articles of unequal value and all under cover are placed and the competitors, with a fishing rod and line and hook attacked, fish up articles, the value of which is of course unknown until taken out.

Subdivision 11 of section 331 Postal Laws and Regulations of 1893 declares that "The term 'lottery,' as used in this act, embraces all kinds of schemes, general or local, for the distribution of prizes by lot or chance, such as gift exhibitions, enterprises, concerts, raffles, or the drawing of prizes in money or property at fairs."

It appears that a lottery scheme, conducted under the auspices of a church or charitable society, would be more reprehensible and pernicious in its consequences upon the competitors, than if operated by a professed gambler. It would be difficult indeed to estimate the pernicious effect of the drawing of a prize of value by a boy or girl or even by a person of mature years under the supervision of a Sunday School teacher or a minister of the Gospel. The winning of a prize by a party under such conditions would not only in the language of the Supreme Court of the United States in the Horner case "tend to promote a gambling spirit and a love of making gain through the chance of dice, cards, wheels, or other methods of settling a contingency," but also impress the winner with faith in the morality of "making gain" in that way; and this impression might be so strong as to shape his after life and character; no doubt many a confirmed gambler, whose life has ended in suicide or the penitentiary, could have distinctly traced his love of making gain through "the chance of dice, cards, wheel or other method of settling a contingency" to a prize won at a church fair under the eye and sanction of his minister or religious teacher.

A lottery scheme can no more be justified on the ground that its object is to raise money for religious or charitable purposes, than can theft for the same purposes be justified. *Boyd vs. State*, 61 Ala. 177; *Tuskaloosa Scientific and Art Association vs. State*, 58 Ala. 54; *State vs. Overton*, 16 Nev. 136; *Governor's Alms House vs. Am. Art Union*, 32 How. Pr. 341, 7 N. Y. 228; *People vs. Am. Art Union*, 7 N. Y. 240; *People vs. Am. Art Union*, 13 Barb. 577; 3 Selden, 235; *Bennett vs. Am. Art Union*, 5 Sandf. 614; *Rolfe vs. Dolmar*,

7 Robert, 80; Negley vsi. Devlin, 12 Abb. Pr. (N. S.) 210;
Ex parte Blanchard, 9 Nev. 101.

GIFT ENTERPRISES; MISCELLANEOUS SCHEMES.

Sec. 77. In *Randle vs. State*, 42 Texas, 580, the defendant and two others operated a scheme under the name of "The Galveston Gift Enterprise Association," which was licensed under the laws of Texas, to conduct a gift enterprise. The prizes were distributed by chance. The court held that the scheme was a lottery. Two experts testified that the enterprise was not a lottery because each ticket holder received something in return for his money. Speaking of this evidence the court said: "The opinion of two experts that this was not a lottery can scarcely be expected to have any weight against the opinion of the most enlightened judges in the country, who have repeatedly held that the fact of each ticket holder being certain to receive something did not relieve it from the character of a lottery."

In another place the court said: "The act to regulate taxation, June 3, 1873, which levies an occupation tax upon gift enterprises, has no force or power to legalize this or any of its kindred offenses, whether the pretext be to dispose of books, money, jewelry, land or lots or any species of property, be it real or personal * * * neither will the object or pretense, that it is in aid of a church, a school, an orphan's home, or any other religious, educational or charitable object, improve its legal status. That it makes not the slightest difference whether it be styled a 'gift enterprise,' 'book sale,' 'land distribution or art association,' each and all are lotteries when the element of chance is connected with or enters into the distribution of the prizes."

Sec. 78. In *Eubanks vs. The State*, 3 Heisk, 688, the defendant sold prize candy publicly. The candy was put up in boxes and each box, which was sold for fifty cents, contained candies worth ten cents. Some of the boxes, besides the candies, had in them rings, silver half dollars, watches and jew-

elry. Each contained candy and something else of value not known to either seller or purchaser. He was convicted for promoting the playing at a certain game of hazard and address denominated a gift enterprise and being convicted appealed; and the Supreme Court of Tennessee upheld the conviction.

Sec. 78a. In *Dunn vs. The People*, 40 Ill. 465, Dunn conducted a gift sale. He kept on his desk a box with envelopes standing sidewise in it. Each envelope contained some valuable recipes and popular songs and also "a card descriptive of some article in an immense stock of over 250,000 pianos, watches, sewing machines, engravings, sets of jewelry, books etc., worth \$1,500,000, all to be sold for one dollar each, without regard to value and not to be paid for until you know what you are to receive." A card might represent a grand piano or a finger ring but the purchaser of an envelope might buy the article represented on the card found in his envelope for one dollar or he might refuse to buy the article at all. The price of each envelope was twenty-five cents. It was urged that these envelopes, with their contents, were not lottery tickets, but the court held that they were. On this point the court said: "It is true, as alleged by counsel, that each envelope contained, besides the card, a number of songs and recipes and that the card or ticket representing an article of merchandise to be bought for one dollar confers simply a right to buy, which the holder can exercise or not at his option, and if he buys he does so with his eyes open and with the opportunity of knowing the value of what he purchases. This is true, but the element of chance lies, not in what the holder of the envelope may knowingly do with his card and dollar after he has purchased his envelope, but in the purchase of the envelope itself, which, it is represented to him by the advertisements, may contain a card or ticket that will give him the right to buy for one dollar an article worth hundreds of dollars, or may contain a card that will only give him the right to buy something so valueless as not to be worth buying at any price. So far as men, who manage schemes of this character, can be supposed to give the credulous persons who deal with them any

chance whatever of a return in value of their investment, the chance lies in the sale of the envelope. This, at least, is the chance offered. The plaintiff in error professes to the public as an inducement to purchase his envelopes, that twenty-five cents will buy one, whose contents may represent a cheap trinket or a grand piano, according to the fortune of the purchaser in buying and certainly the fact, that a dollar is to be paid in order to secure the further fruits of the transaction and that it may be consummated or not at the option of the purchaser does not make the transaction any less a lottery than if the dollar were not to be paid at all. * * * Neither would the character of the transaction be changed by assuming that the ticket in every envelope really represents some article of merchandise intrinsically worth the dollar which the holder will be obliged to pay. If every ticket, in an ordinary lottery, represented a prize of some value, yet if these prizes were of unequal values, the scheme of distribution would still remain a lottery.

"We are reminded by the counsel for the plaintiff in error that courts should not extend penal enactments by construction. We acknowledge the obligation of the maxim, but we hold that the transaction proven against the plaintiff in error is within both the spirit and letter of the law. He may choose to call his business a 'gift sale,' but it is none the less a lottery, and we can not permit him to evade the penalties of the law by so transparent a device as a mere change of name."

Sec. 78b. A scheme called a "gift enterprise" and so licensed where small cards are sold with certain numbers on them and there is also a box kept containing a certain number of envelopes each containing a card with a number upon it the party buying a card being permitted to draw from the box an envelope and if the number on the card therein correspond with the number on the card purchased, the purchaser is to get ten times the amount of his investment, is a lottery. *State vs. Bryant*, 74 N. C. 207.

Sec. 79. A party sold at his store in New Orleans packages of "Enterprise Tea" of the value of five cents each. In addition to the tea some of the packages contained tickets, entitling the holder to some article or other, such, for example, as a silk handkerchief, a little lard, a turkey, a chicken, etc., and called prizes. Other packages contained nothing but the tea. The purchaser had the right to select a package from a lot on the counter. This was held to be a lottery by the Supreme Court of Louisiana, in *State vs. Bonniel*, 42 La. Ann. 1110 and 10 L. R. A. 60.

Sec. 80. A party sold candy in boxes at 50 cents each, representing each box to contain besides the candy a prize of money or jewelry, but each purchaser selected his box in ignorance of its contents. Held that this was a device in the nature of a lottery. *Holman vs. State*, 2 Texas App. 610; *Miller vs. Com.*, 13 Bush (Ky.) 731.

The sale of packages of candy, in some of which coupons were placed, which were cashed at a counter on presentation, the drawing of such prize being announced by a gong, was held to be a lottery in *Com. vs. Sheriff*, 10 Phila. 203, though it was posted "no lottery."

Sec. 81. In *Regina vs. Freeman*, 18 Ontario Rep. 524, the defendant had on his shelves cans of tea, in one of which was a gold watch, in another a diamond ring, and in a third twenty dollars in money. The cans of tea were offered for one dollar each with the privilege of choosing any one can. He was convicted of operating a lottery scheme and on appeal to the Divisional Court the conviction was sustained.

Sec. 82. A party issued tickets as follows: "The bearer is entitled to admission to a grand concert for the benefit of ——— to be held in Washington, D. C., on ——— and to whatever gift may be awarded to its number. Tickets, \$5.00 each." Each ticket was numbered. The party advertised that the concert was to be given to raise money for the benefit of the Foundling Asylum of the Sisters of Charity of New York and Sailors & Orphans' Home of Washington, D. C., and that the gifts to be awarded consisted of real estate, bonds

and cash constituting 1003 gifts, valued at \$260,000. This was held to be a lottery in *Negley vs. Devlin*, 12 Abb. Pr. (N. S.) 210.

Sec. 83. A firm placed in its window a locked box, with a glass front, containing \$25 in bills, and advertised that all persons, buying goods in their store, and paying therefor 50 cents or more, would be given a key, and one and only one key would be given out which would unlock the box, and that the person receiving the key, that would unlock the box, would be given the \$25 in it. This was held a lottery in *Davenport vs. City of Ottawa*, by the Supreme Court of Kansas, 39 Pac. Rep. 708.

The court said: "It is said that no element of chance existed, because the right of the purchaser to obtain a prize was, in fact, absolutely determined the instant he received the key. If the key fitted the lock, the money was his from that instant. If it did not, it was not to be his. This contention is not sound, though specious. Neither buyer nor seller was supposed to know which was the true key to the box and the fact would only be actually determined when the trial was made at the time appointed to unlock the box. But even if we assume that the chance was determined when the sale was made, it would be equally a lottery, for the fortunate person would at once obtain a right to the prize, though he could not in fact get it until the time appointed. The unfortunate purchaser would at once receive his merchandise and his blank in the lottery. No sound distinction exists between the principle involved in this case and that in the case of *State vs. Mercantile Ass'n*, 45 Kansas, 351. The case of the *State vs. Mumford*, 73 Mo. 647, is also directly in point. Prizes were offered for subscribers to the *Kansas City Times*, each subscriber receiving a ticket entitling him to participate in a drawing of prizes and no extra charge above the ordinary subscription price being made. The Supreme Court of Missouri held this a lottery and that subscribers to the newspaper bought at the same time and for the same consideration the newspaper and the ticket in the lottery. So, in this case, the purchaser for one undi-

vided price bought merchandise and a ticket in the scheme, which was to determine who should have the prize. These views are also upheld in the cases of *Hudelson vs. State*, 94 Ind. 426; *U. S. vs. Zeisler*, 30 Fed. R. 499; *Bell vs. State*, 5 Sneed, 507, and *Thomas vs. People*, 59 Ill. 160."

It was conceded in this case that the main purpose of the merchants was "to increase their legitimate business by this scheme and that the sale of the merchandise was not used merely as a cover for conducting a lottery."

Sec. 84. In *State vs. Clarke*, 33 N. H. 329, (decided in 1856), it appeared that a party kept a store and sold books with numbers on them. The defendant after the sale of a book would open a book and place a piece of zinc with a hole in it on one of its pages and then inform the purchaser what prize he was entitled to. Defendant insisted that this was not shown to be a lottery. The statute of New Hampshire at that time prohibited "anyone, under a penalty, from making or putting up a lottery or disposing of any estate, real or personal, by lottery." The court said: "The word 'lottery' is not a term of the law. * * * In construing the statute we must be guided chiefly by the meaning of the term as it is ordinarily used in a popular sense and by reference to the mischief intended to be redressed. * * * The name given to the process and the form of the machinery used to accomplish the object are not material, provided the substance of the transaction is a distribution or disposition of property by lot. In the interpretation of remedial statutes like this, the 'office of the judges is to make such construction as will suppress the mischief and advance the remedy and to suppress all evasions for the continuance of the mischief.' *Magdalen College case*, 11 Co. 71, b. * * * From the evidence in this case, the jury were well warranted in finding that, according to some scheme upon which the defendants preferred to act, there was a correspondence between the numbers placed on the books purchased and the different articles proposed as gifts or prizes, by which, when the book was purchased, the defendants ascertained what gift or prize the purchaser was entitled to

have according to their scheme. * * * It was objected that by the purchase of the book with a number that in some way designated the gift to which the purchaser was entitled, his gift was ascertained at once upon the purchase and did not depend on any subsequent drawing of lots, and that, therefore, the case does not fall within the meaning of the word 'lottery' as it is ordinarily used and is not within the statutes. But with the purchaser what prize he might obtain was a mere matter of lot or chance. The scheme involved substantially the same sort of gambling upon chances as in any other kind of lottery. It appealed to the same disposition for engaging in hazards and chances with the hope that luck and good fortune may give a great return for a small outlay and as we think within the general meaning of the word 'lottery' and clearly within the mischief against which the statute is aimed." The court, after stating that assurance had been given by the promoter that the presents should be awarded fairly and that each adventurer had received for his money a numbered receipt, inquired how presents of unequal value could be awarded fairly unless by some lot or chance and what could be the purpose of numbers, if all the numbers were to be favored alike.

Sec. 85. In *Bell vs. The State*, 5 Sneed (Tenn.), 507, the defendant, Bell, sold books at the usual market price and with each book offered a prize, varying in value from \$40 down, to be drawn on the purchase of each volume. The names of the prizes were written in a blank book and a sort of sliding scale was fitted over the names and so arranged that at the purchase of a book the scale was slid down a line and revealed the name of the prize the purchaser of the book was to get. The court said: "Gaming is an agreement between two or more to risk money on a contest or chance of any kind where one must be loser and the other gainer. Some games depend altogether upon skill, others upon chance and others of a mixed nature. Billiards is an example of the first, lotteries of the second and back gammon of the last. 2 Bou's. Law Dic. 553. A lottery is a game of hazard in which small sums are ven-

tured for the chance of obtaining greater. Now, in view of these definitions, what is the case before us? Is it not a species of gambling called a lottery? A small sum is ventured for the chance of a greater, one dollar or five dollars, perhaps, for a book *and* the chance of a watch valued at forty or a set of instruments at two dollars, or a box of wafers worth ten cents. If the book is certain without hazard, the watch is not, that depends on *chance*. So all pay money, at least in part, for the chance of winning a prize of a greater or less value. According to every correct idea of legal definition this must be *gaming* and all concerned are guilty of the offense. All these artifices to evade and cheat the law and entrap the unwary are but aggravations of the offense."

Sec. 86. In *Governors of Alms House vs. American Art Union*, 7 N. Y. 228, the Art Union was authorized by the Legislature of New York in 1844. The Union charged \$5 for membership. The funds raised were used to establish in New York a gallery of art for the exhibition of works of art to be kept open to visitors free of charge; each member was to get one or more fine engravings annually and a copy per month of a magazine published by the Union. Pictures of unequal value, but none worth less than \$5, were purchased and at the end of each year these were distributed among the members by lot.

The Constitutions of the State of 1821 and 1846 provided that "no lottery shall hereafter be authorized in this State." The contention in this case was, that each member received the full value of the money he invested; that the object of the scheme was praiseworthy and for moral purposes and that the prizes awarded had no market value; that the prizes had not been designated at the time the money was paid; and that the State Constitution did not intend to prohibit such a scheme. But the court held otherwise, and declared the scheme a lottery and the act authorizing it unconstitutional.

Sec. 87. In *Hull vs. Ruggles et al.*, 56 N. Y. 424, the plaintiff sold and delivered to defendants 300 packages of

candy and sixty pieces of silver ware, for which defendants promised to pay plaintiff the sum of seventy dollars and the action was brought to recover that sum. The defendants defended on the ground that the packages of candy were so prepared as to make the scheme a lottery and, therefore, unlawful. It was shown at the trial that the plaintiff so put up the packages of candy as that, in some of the packages, there were no tickets, while in others there were concealed tickets, on which was the name of some one of the articles of silver ware, to which the holders of the tickets were entitled on presentation to the vendor of the packages. The court said: "Section 38 of the Revised Statutes (1 R. S. 668, Sec. 38), declares that every sale of any goods for the purpose of aiding in a lottery is void and of no effect. It is difficult to perceive how a sale of goods so packed and arranged as to enable the purchaser, without alteration or readjustment of them, to carry out a scheme, which, when accomplished, is an unlawful lottery, and sold thus with knowledge, or with reasonable cause for belief, that the purchaser, by the disposal to the public of the goods thus arranged, intended to violate the Statutes against lotteries, is not a sale for the purpose of aiding in a lottery. It can not be otherwise. The sale of the plaintiff to the defendants was to aid in carrying on an unlawful lottery and was void."

Sec. 88. The publisher of a newspaper advertised that anyone who subscribed for the paper for one year or who was indebted to the paper for subscription thereto and would pay up would receive a ticket in a drawing to take place on a day named. The tickets were to be placed in a covered box and the fifteenth ticket drawn out would be the prize ticket, entitling the holder of the ticket having the corresponding number on it to a sewing machine and the holders of the last fifteen numbers taken from the box would each be entitled to a copy of the World Almanac. This was held in *U. S. vs. Wallis*, 58 Fed. Rep. 942, to be a lottery. Here it will be observed that those who were indebted for the paper could procure tickets by paying what they owed, and from this fact

it would appear there was no consideration paid for the chance. It may be very well doubted whether the payment of a debt already contracted and due can be regarded as a valuable consideration and yet it may come and probably does come within the principle announced in the Horner case that the sale of a chance in a lottery constitutes a sufficient consideration to support a lottery scheme where the chance operates as an inducement to an adventurer to buy something else the promoter has to sell. The rule in regard to the element of consideration in a lottery scheme is broader than in ordinary contracts and business transactions, for in lotteries the less an adventurer pays and the more he gets, if he wins, the more apparent the wager becomes, the fundamental principle of gambling being to get something for nothing.

Sec. 89. The defendant in *State vs. Mumford*, 73 Mo. R. 655 (39 Am. Reps. 532), being the business manager of a newspaper, advertised that four distributions of premiums would be made to the subscribers of the paper during the year 1877, amounting to \$20,000 personal property, consisting of pianos, books, guns, sewing machines and many other useful articles with the value placed opposite each and that to each subscriber a ticket would be given, which was good for all the distributions. The allotment of the prizes were superintended by a committee selected by the subscribers and the allotments were made by drawing tags from two wheels, one representing the number of the ticket and the other the number of the prize. The defendant had nothing to do with the allotments except to furnish the paraphernalia for the distribution and to furnish and deliver the prizes to the subscribers. The subscribers paid no more for the paper and a ticket than the regular rate for the paper alone. The defendant insisted that this scheme was not a lottery because the newspaper was intrinsically worth the subscription price, which was not increased by reason of the scheme, but the court overruled this contention and held the defendant had been rightfully convicted of the offense of operating a lottery. On this point the court said: "The fact that the subscription of

the Times was not increased does not alter the character of the scheme, inasmuch as the price paid entitled the subscriber *to a ticket in the lottery as well as a copy of the paper.*"

So far as the record shows the court tacitly conceded that defendant was guilty of the offense though he did not personally allot the prizes, which was done by a committee appointed by the subscribers themselves.

Sec. 90. *Barclay v. Pearson et al.* (1893), 2 Ch. 154, was a case where the defendant was a proprietor of a newspaper and carried on a competition as follows: He published in his paper a paragraph, omitting the last word. He printed also a coupon, with directions that any person, wishing to compete, should cut out the coupon, fill in the missing word and send it, with a postal order for one shilling, to the office of the paper. It was stated that the missing word was in the hands of a chartered accountant in a sealed envelope and that his statement would appear with the result of the competition in his paper, and the whole amount of money, received in entrance fees, would be divided equally amongst those competitors, who filled in the missing word correctly. Coupons to the number 474,574, with sums of money amounting in all to 23,628 pounds and 14 shillings were sent to defendant Pearson. In an action by the unsuccessful competitors against the proprietor of the paper, the accountant and the successful competitors, seeking administration of the money in the hands of the defendants, as trust funds, for the purpose of the competition and distribution among the persons entitled thereto. It was held: 1. That the competition was a lottery within the meaning of 42 Geo. 3, C. 119 and was illegal. 2. That, so far as the money in the hands of defendants was impressed with any trust, it was one arising out of an illegal transaction and the court would not render any assistance in its administration and *semble*, 3. That notwithstanding the illegality of the competition, the competitors had a legal right, at all events, to the return of their contributions, provided they gave notice of their claim before the money had been distributed by defendant, Pearson.

It was argued for plaintiff that there was no chance in the scheme and a case before Sir John Bridges was cited. In that case the missing word was not selected by the promoter but was drawn, after the entries were closed, from a number of other words, written on pieces of paper and placed in a bag and it was insisted that rendered the selection a mere chance. But Sterling, J., asked, "Is there not also in this case the element of chance? That must be so, unless the winning word is *necessarily* the word which is most appropriate to the sentence."

The counsel answered: "In order to constitute a lottery there must be a pure chance, which is not the case here. If the element of selection is present, then it is not a lottery. If any power of reason or will is exercised upon the question of selection then the element of chance is gone and there is no lottery."

Sterling, J. "In this case the word is determined by the arbitrary selection of the editor of the paper."

Counsel replied: "If it were chosen after the competition, that might make a difference but here it is fixed upon by the editor, previous to the competition, and this is no chance and therefore no lottery. Skill and thought were required by the competitors in selecting the word."

The counsel for the unsuccessful competitors argued: "It is said that the competition is not a lottery, because there must have been an exercise of will or mind in the selection of the word; but in order to prevent its being a lottery there must be an exercise of the intelligence or skill. Mere volition is not enough. If it were, then there could never be lottery, for there must be an exercise of will power in the mere choice of a ticket. The word is arbitrarily chosen by the editor. The guessing at the word is the event, upon which the competition is decided and that was pure chance and makes it a lottery.

* * * There need not be a mechanical drawing of lots, or casting of dice to constitute a lottery. The fact that the word is chosen before the commencement of the competition is immaterial. *Morris vs. Blackman*, 2 H. & C. 912; *Roddy*

vs. Stanley, 5 Ir. Jur. 10. The certainty of the event before the competition does not prevent its being a lottery. According to the history of the Lottery Acts, the question does not depend upon the presence or absence of a mechanical lot; but what is aimed at is the staking of money upon a chance."

The court (Sterling, J.), said: "It is not of the essence of the competition, that the word to which success attaches, or as it is called the 'correct word,' should be the most appropriate to fill the gap. In the present instance many words appear to me more appropriate than 'accountable' (the correct word in the scheme). No clue is given to the mode in which, among the many words more or less appropriate, that, to which success is attached, is actually chosen. I infer the selection is perfectly arbitrary or, in other words, that it is made by chance and is none the less so, because the range of selection, though wide, is not unlimited. * * * I think the distribution takes place by chance. In coming to that conclusion I have the guidance of a decision (which doubtless is not binding on me but which appears perfectly correct), of the present learned and experienced magistrate at Bow Street, Sir John Bridges. He had to consider the case of a competition conducted generally on a similar mode to that now in question, but with the following variations in detail: The word to which success attached was not fixed until after all the coupons had been sent in and was then chosen by selecting from a bag one of twenty or thirty pieces, on which had been written words which were more or less appropriate solutions. The magistrate held that it was a scheme for the distribution of prizes by chance and consequently a lottery. In giving judgment he is stated to have said (according to the report, with which I have been furnished): 'If the competition is decided by skill and judgment and not by chance, then it is not a lottery. If competitors were asked to supply the word (by which I understand him to mean the most appropriate word) and not a word—it makes a difference. The defendants do not pretend to say that they call for the selection of the most fitting word with which to complete the sentence. The selection of the

word must be entirely a matter of chance. On that ground the case comes within the meaning of the Lottery Acts.' I agree with these observations and think them applicable to the present case. Neither the circumstance that the word is determined before the competition begins, nor the circumstance that the mode of selection is unknown, appears to me to give rise to any real difference. It was urged that the chance or lot contemplated by the statute, 42 Geo. 3 C. 119, must be *ejusdem generis* with those enumerated, viz.: dice, lots, cards, balls, numbers or figures. I think the use of a physical lot is form, not substance; the arbitrary, unfettered choice of the editor of Pearson's Weekly does not substantially differ from the selection by means of the bag mode in the competition which gave rise to the decision in Bow Street and the lottery was admitted to fall within the terms of the Act."

Sec. 91. The following gift enterprises have been held by the Assistant Attorney-General for the Postoffice Department to be lottery schemes.

A party offered boxes of medicine for sale and stated that in every twenty-fifth box there was a five dollar gold piece.

In each month of the year 800 five cent pieces were put in that number of packages of tobacco; 250 ten cent pieces in that number of packages; 100 twenty-five cent pieces in that number of packages, and so on to the end of the list, twelve of the packages containing \$25 each. The purchaser of a package became the owner of the money in it.

A publisher of a newspaper advertised that a certain railroad company would daily give \$2.50 each for certain numbers of the paper forwarded to it, all the papers issued being numbered.

A publisher gave tickets to the patrons of his paper, the tickets being numbered in the order the subscriptions were made and advertised that prizes would be awarded to the five hundredth, one thousandth and ten thousandth subscriber.

The vendors of typewriters gave tickets to purchasers, which were numbered in the order the sales were made and the fiftieth and five hundredth purchasers were to receive prizes.

A United States Treasury note was deposited with a State Treasurer, the figures of the number of the note were given but not in the order they appeared on the note and a prize was offered to the party guessing nearest the number on the note.

A party offered a prize to the person who would guess nearest to the time a certain watch would stop running.

A party offered to present a bicycle to the person guessing nearest to the factory number of the wheel.

A five hundred dollar bill was placed in a safe and a prize was offered to the party who would guess the number on the bill.

A prize was offered to the person who would give the nearest correct answer to the question: "What distance will a certain pony, harnessed to a wagon, be driven on the 4th day of July next, and how long will it take to cover such distance?"

The Assistant Attorney-General for the Postoffice Department also held that prizes offered to parties giving the correct words in missing word contests depended on chance, unless the sentences were taken from the published works of well known authors. As a practical question, however, taking the sentences from well known works did not in fact eliminate the chance element, for 999 out of every 1,000 competitors did not look for the sentences in such works but simply guessed what the missing words were and in that case their guesses depended as much on chance as if they had been without the means of unerringly ascertaining the correct words. And a scheme was held not to be a lottery when it was stated the missing word in the sentence could be found in the advertisement itself. But even then the guess would depend on chance if more than one word that would complete the sense could be found in the advertisement. In that case the guesser could not know which word to select.

But in the guessing contests of this character, however, the competitors, as a rule, are given the privilege of making as many guesses as they please and hence they give all possible words to complete the sense of the sentence and thus remove

the chance element and in such contingency, the promoters in order to avoid giving prizes to all the successful competitors notify the public that if two or more give the correct word the prize will be divided among them; and then the schemes become lotteries because the amount of the prizes is made to depend on chance.

Sec. 92. Merchants and other business men sometimes put up packages of merchandise for sale, in each of which a letter of the alphabet or one of the nine digits is placed, so as to be hidden from view and offer prizes to purchasers who will return to the vendors enough of the letters to spell a word or group of words or a certain number of the nine digits. According to the scheme a given letter or number might be found in only a few packages and perhaps in one package only. This was held to be a lottery scheme by the Postoffice Department on the ground that one purchaser might have to buy thousands of packages to get the proper letters or numbers, while others might get them by buying the number of packages, corresponding with the required number of letters or numbers and still others might not draw all the letters or numbers at all. In fact in one case the Postoffice Inspector reported that a certain promoter of a scheme of this character intentionally failed to sell the packages containing one of the required letters so that it was impossible for the purchasers to comply with the conditions.

GIFT CONCERTS; MISCELLANEOUS SCHEMES.

Sec. 93. In *State vs. Shorts and Tinsley*, 3 Vroom, (32 N. J. L.), 398, decided in 1868, the defendants exhibited a panorama. Each person at the door of the show got a ticket with a number upon it. At the close of the exhibition one of the defendants called at will any number and the person holding the corresponding ticket presented himself upon the stage, when, if the exhibitor liked his appearance, he presented him with one of the eight hundred articles advertised as gifts. It was, also, one of the terms of the project that at the option of the defendants a

distribution of presents might be dispensed with. The defendants insisted that the transaction was not a lottery on account of the presence in it of the element of free will on the part of the exhibitor with regard to the distribution of presents. The court, in reply to this contention, said: "But this line of argument is far too subtle to be sound. Taking a practical view of the thing, its real nature can not be misunderstood. It is clearly a lottery if tested by any of the ordinary definitions of that term. 'A lottery,' says Johnson, 'is a game of chance; a distribution of prizes by chance.' * *

"In fact, it may be said with truth that the winner in this particular lottery has had a series of strokes of good fortune; for he has found by accident the projector in the propitious mood; he has drawn the favored number; and he has not been rejected on account of his personal appearance—circumstances which look like the results of mere casualty, for it is not pretended that the projector, either in the matter of volition as to the giving of presents or of approbation as to the recipients of them, founds his action on any settled rules of conduct which would appear reasonable to himself or to others. My conclusion is, that this is a game of chance and, consequently, a lottery and none the less so because of those reservations of control over it by the adroit use of which the getters-up of the game were sure, in all substantial respects, to be the winners. It is an affair conspicuously within the mischief at which the Statute is leveled. The particular traits of it above noticed appear like devices to evade the law. But the law regards not mere semblance, but the substance of things, and, consequently, these devices, however ingenious, can not be successful."

Sec. 95. In *Queen vs. Parker*, 9 Manitoba R. 203, the defendant's mode of operation was as follows: "He held a concert in the Market Square, Winnipeg, and after some music he sold boxes of what he called 'Parker's Pacific Pens.' Before the sale he had placed in an empty box 100 envelopes with five dollars in each, 5 envelopes with ten dollars in each and one envelope with fifty dollars in it, making altogether

\$250 in 116 envelopes. He also placed in the box 116 envelopes containing only blank pieces of paper. Every person paying one dollar for a box of pens was entitled to draw an envelope and a person paying five dollars for a box of pens could draw eight envelopes; but he would not take more than five dollars from any one person, in order, as he said, to protect himself, because if one man took 232 envelopes he would be out \$18 besides the 232 boxes of pens.

If the envelope, containing fifty dollars, was drawn before two-thirds of the pens were sold he would put in the box another envelope containing fifty dollars and fifty envelopes with blank papers. He said he did not sell the envelopes. He was convicted for a violation of the Manitoba Statute which prohibited the selling or offering for sale of "any lot, card, ticket or other means or device for advancing, lending, selling or otherwise disposing of any property real or personal by lots, tickets or any mode of chance whatsoever," and on appeal to the Court of Queen's Bench of Manitoba the conviction was sustained. The court quoted from *Taylor vs. Smetton*, 11 Q. B. D. 207, as follows: "In making his purchase he (the purchaser) exercised no choice; what he got he got without the least option or action of his own will but as the result of mere chance or an accident."

Sec. 96. In *Taylor vs. Smetton* (1883), 11 Q. B. D. 207, the appellant erected a tent, in which he sold packets, each containing a pound of tea, for 2 shillings 6 pence a packet. In each packet was a coupon, entitling the purchaser to a prize and this was publicly stated by the appellant before the sale but the purchasers did not know, until after the sale, what prizes they were entitled to, the prizes ranging in character and value. The tea was good and worth the money paid. Held that this was a lottery within the meaning of 42 Geo. 3 C. 119, S. 2. The court said that the scheme was adopted by appellant, no doubt, "with a view to induce purchasers to realize a profit to himself; and though it was admitted by the respondent that the tea was good and worth all the money, it is impossible to suppose that the aggregate prices, charged

and obtained for the packages, did not include the aggregate prices of the tea and the prizes. Nor can it be doubted that in buying the package the purchaser treated it as a purchase of the tea and coupon, whatever its value might turn out to be." The cases of *Morris vs. Blackman*, 2 H. and C. 912 and *Reg. vs. Harris*, 10 Cox, C. C. 352 were cited as strongly confirmatory of the views expressed by the court.

Sec. 97. In *Morris vs. Blackman*, 2 H. and C. 912, J. P. 199, an attempt was made to evade the law by setting up a lottery under the guise of distributing presents gratuitously and capriciously among the audience. Morris kept watches, pieces of plate and other articles on exhibition in his window with the placard: "These presents, with others, will be given away by W. Morris at the conclusion of his entertainment at N. Rooms, Brighton, to-night and every evening during the week." He sold tickets and the purchasers received a copy of the programme, in which it was stated that "at the conclusion of the entertainment Mr. Morris will distribute among his audience a shower of gold and silver treasure on a scale without parallel; besides a shower of smaller presents, which will be divided among the audience and given away."

When the entertainment was concluded a quantity of these presents were placed on a table and Morris then took the articles, one at a time, and awarded them to the occupiers of seats, having certain numbers. The court held that this was a mere contrivance to conceal what was really a game or lottery within 42 Geo. III, C. 119. Pollock, C. B., used this language: "I have no doubt that not one of the audience had the least notion that the proprietor was to give the articles to any person he pleased; but that every one thought he had a chance of winning."

This language seems to imply that the Chief Baron thought the articles that were awarded to the occupiers of certain seats had been previously determined by some kind of a drawing and if his decision can be construed to mean that if the proprietor gave "*the articles to any person he pleased*"

the transaction did not have in it the element of chance, it can not be sustained by the weight of authority.

It was distinctly held in the late case of *Barclay vs. Pearson*, 2 Ch. D. 154, that the arbitrary selection of a word by the promoter in a missing word contest was equivalent to selection by lot and the same principle is asserted in many of the other cases cited in this work.

Sec. 98. In *Thomas vs. The People*, 59 Ill. 160, Thomas sold tickets in this form:

"Chicago Industrial College and Home Festival.

This ticket is a receipt for Five Dollars in payment for and delivery of a Copy of a Steel Plate Engraving, and admission to our Concerts and Lectures for which it is sold."

At the time of the delivery of this ticket a hand-bill was given the purchaser entitled "Grand National Festival to erect, in the City of Chicago, an Industrial College and Home for Unfortunate Females" and it stated that the promoter was to give a series of musicales, receptions and a course of lectures in Chicago, and was at the close thereof and after the sale of 200,000 copies of the steel plate engravings to distribute to the purchasers of engravings, "in a just and legal manner," \$200,000 in presents. The court held this to be a lottery, saying: "The term 'present' though literally it means a gift, yet, in the relation and in the sense in which it is used, evidently meant a prize. It was offered as the reward of contest to the purchasers. It was something to be won. * * * Here there was a scheme for the distribution of prizes. * *

"Even if the tickets to the concerts and lectures and an engraving were intrinsically worth \$5, the scheme would still be a lottery. The hand bill advertisement, delivered with each ticket held out an inducement to purchase. Each person who invested \$5 became entitled to a chance of \$50,000 in glittering gold or \$25,000 in green backs, or a splendid residence in Chicago or in Brooklyn, N. Y. The purchasers were thus incited to rivalry."

The law, construed in this case, prohibited the vending of lottery tickets.

OFFERING A PRIZE TO THE FIRST SUCCESSFUL COMPETITOR,
A LOTTERY SCHEME.

Sec. 99. Here again, the promoters make their schemes so alluring and so easy of solution, that all classes are tempted to enter the contests. In a case, that was brought to the attention of the Postoffice Department, it was discovered by a Postoffice Inspector that a party in Washington City advertised that he would, on the receipt of thirty cents, forward, by mail, several packages of flower seeds, and would give a piano to the party who would send to him the first solution of a face puzzle; that he had advertised the scheme one week in Virginia, the next week in Georgia, and the next week in Pennsylvania, and that he had received 2,800 answers and every one of them was correct, the puzzle being so simple, even a child could solve it. Notwithstanding he knew the prize had been taken when the first answer was received, he inserted new advertisements in different sections of the country, offering the same old prize. This was held to be a fraud, as well as a lottery.

At one time, the Department allowed schemes of this character to be advertised through the mails, upon the supposition that the prize would go to the party who was the most energetic and intelligent; in other words that men by their will and forethought could control the result. The promoters, at first, simply advertised that the prizes would be awarded to the first successful competitors, without prescribing any rule by which the first could be determined. It was soon found that this would not do. It was suggested that the receipt of the answer at the office of the promoter be taken to ascertain which was first. The answer was that if two or more should be received in the same mail and at the same time, there would be no way to award the prize among these except by lot. Then the promoters advertised that in order to determine who was first, the post-mark of mailing on their letters, transmitting their solutions, should be resorted to. For awhile

the Department thought this would eliminate the chance element from the schemes and many of them were advertised through the mails. It was soon demonstrated, however, by experience and experiments, that this would not do and the Department came to the conclusion that a contestant, in one of these schemes, could not know, or determine, or control the award of the prize by his reason, foresight, sagacity, or design. It was found that letters, containing the solutions, had the same post-mark of mailing in many cases, and hence the mark did not indicate which was first.

The following may be mentioned among the uncertainties inherent in this plan of awarding prizes, which render it impossible for a party to determine the result by his energy, sagacity or design, viz.: 1. The offer of the prize may not, and in nine times out of ten does not, reach all the contestants at the same time. A prize is offered in an advertisement in a Washington paper. The paper is delivered to city subscribers in an hour or two after issue, but it does not reach a California subscriber for six or seven days, and between these extremes, the time it reaches subscribers varies, no two places being precisely alike as to postal facilities, to say nothing about the residences of subscribers in their proximity to the postoffice.

2. The post-marking of letters varies to such a degree in the different postoffices in the country that it can not be relied on to determine who answers a question first, or even who deposits a letter in the office first. At first, second and third-class offices (and at fourth-class offices where the salary is more than \$500), the post-mark shows the day and hour of the next outgoing mail. That is to say, the letters may be stamped "10 a. m." when the mark is actually put there at 7 a. m., because 10 a. m., is the time the mail leaves the office. At fourth-class offices where the salary of the postmaster is less than \$500, the post-mark is not required to show the hour of mailing, but only the day; and, of course, at offices where there are weekly or semi-weekly mails the post-mark is changed weekly or semi-weekly, as the case may be, in order to show simply the day of mailing. Now suppose A, B, C and

D deposit letters in four different offices at 7 a. m., April 27, 1895. A puts his letter in the office at New York City, and it is post-marked 7:30 a. m.; B puts his in the Washington office, and it is post-marked 8:30 a. m.; C puts his in a fourth-class office where the salary is less than \$500, and it is post-marked April 27, 1895, without the hour at all; C puts his in an office where there is only a weekly mail, which leaves on Tuesday, and his is postmarked "May 1, 1895;" or, to put a stronger case, suppose D deposits his letter in a postoffice which has but a weekly mail, leaving every Saturday, and the letter is deposited on Monday; and A deposits his letter in an office, having a daily mail, on Friday, after D's letter was posted, then D's letter would be post-marked Saturday and A's Friday, and thus these marks would show that A was first, though, in fact, D was ahead of him by several days. This contingency may be illustrated in an infinite variety of ways, by which it will manifestly appear that the post-mark will not determine which is first in time, in fact.

But aside from these elements of chance, which are present in schemes of this character, the temptation to fraudulent practices is so great, that most of the promoters give way to it. Ordinarily the parties, offering the prizes, are utterly irresponsible and in the most of the cases no prize is awarded at all, or if it be awarded, it goes to some one, who is on the ground floor and has his answer in before the scheme reaches the public, or as in the instance given above, the promoter continues to insert new advertisements offering the same old prize, after he knows it has been already taken many times over. As soon as all these phases of this plan of doing business were presented to the Department, the promoters of the schemes were denied the use of the mail facilities of the United States; and it is hoped they will, in time, be stamped out of existence, for they not only appeal to the gambling spirit of the people and beget a love of obtaining something for nothing but they are also unquestionably, in most cases, fraudulent in design and in practice and for that reason are more pernicious than an avowed lottery, like the

Louisiana concern, in which, no doubt, the prizes offered were awarded in fact, and awarded in an honest way.

Lottery Schemes Where the Amount of the Prizes depends on Chance.

Sec. 100. The chance element may be present in a lottery scheme, though the event, upon the happening of which the prize is to be awarded, is not, in the least, doubtful. This element is present, when the amount the winners may receive is dependent on chance.

The promoters of lotteries and gift enterprises always devise their schemes, so as to take no risk themselves but to compel the adventurers to assume all the risks. They sometimes do this by adopting a scheme in which there can be, or at least there are likely to be, no more than a fixed number of winners, as in all regular lotteries, and hence the promoters know, in advance, the maximum amount they will be required to pay. The scheme may be such, however, that the number of winners is entirely indefinite and in that case the promoters add conditions, that shift the chances of this lack of certainty from themselves to the adventurers. This is usually done in one of two ways: First, by providing that the first one, meeting the condition, on which the prize is offered, shall receive the prize or second, by providing that if more than one comply with the conditions the prize, offered, shall be divided among them. The schemes, in which these methods are adopted, probably open a wider field for fraud and give less satisfaction to the adventurers, both losers and winners, than any others, because in one case the promoters continue their advertisements and continue to receive the people's money long after they, (the promoters), know the prizes have been taken and in the other case the successful adventurers hope for a large prize, when by the process of division among them, they get a mere pittance.

In a case brought to the attention of the Postoffice Department a party, in connection with the sale of a patent

medicine, offered a prize of \$800 to the person, who would correctly fill up twelve skeleton words and if more than one filled them all, the prize would be divided between them. The Department permitted this scheme to be run through the mails, as an experiment, and at the end of the time, it was found that so many had met the conditions in full, that the competitors received only seven cents a piece and that sum was paid by the checks of the promoter on a bank in Washington City, so that to the competitors living outside of that City the prize was entirely valueless. Complaints by the hundreds, charging fraud, poured into the Department and after that, schemes in which the prize was to be divided among the successful competitors, if there should be more than one, were held to be not only lotteries but frauds as well.

Where these methods are adopted the conditions of winning are purposely made so simple as to entice the public and induce thousands to enter the lists.

The writer lately saw an advertisement of a scheme, which, for simplicity and facility of solution, surpassed anything that ever came under his observation. The party offered a prize of \$100 to the person, who would correctly count the dots, displayed in the advertisement in such a way and to such a number as to make it simply a matter of counting and nothing more, and it was added that if more than one correctly counted the dots the prize should be equally divided among them. All, old and young, who can count a hundred, will be attracted by the simplicity of this scheme and the promoter will, no doubt, reap a rich harvest; while his dupes will be filled with chagrin and disgust when the returns come in and they find, by the process of division, they will not get enough to pay the postage on their letters transmitting their solutions, much less repay them for the sums they were required to remit, in order to have the privilege of entering the contest. That such enterprises are lottery schemes, there can be no doubt, upon reason and authority.

Sec. 101. In *Tollett, App. vs. Thomas, Res.*, L. R., 6 Q. B. 514, the appellants were convicted in the trial court

under 31 and 32 Vict, C., 52 S. 3, which provided that "any person playing or betting in a public place with any table or instrument of gaming at any game of chance should be liable to be convicted as a rogue and vagabond. From the evidence, it appeared appellants were the proprietors of a machine, called a "piri-mutual." The machine had on it numbers, beside each of which were three holes and behind these holes were figures which could be made to shift on the turning of a key, so that any number from 0 to 999 would be exhibited behind these holes. On top of the machine was the word, "total," and beside it were holes, in which could be exhibited in a similar manner figures shifting on the turn key. This machine was taken to a race course and each number was made to designate a particular horse. Any one desiring to bet on a particular horse deposited with appellants half a crown, and received a ticket appropriated to the horse; and appellants, by a turn of the key, altered the figures increasing the sum indicated along the side of that number by one; and the same turn of the key increased the figures beside "total" by one. When the race was run the holders of the tickets with the number of the winning horse had divided among them the amount of the half crowns deposited, less 10 per cent which the appellants retained as proprietors of the machine.

On appeal to the Court of Queen's Bench, this scheme was held to come within the act. Chief Justice Cockburn, delivering the opinion of the court, said: "Thus, with ingenuity worthy to be employed in a better cause, it was contrived that each person who was induced to bet might see at a glance what was the amount of the odds offered, if he bet on a particular horse; but (and this is material to be observed) the state of the odds was liable to be changed before the race was run.

To illustrate what is meant, let us suppose that at some particular time the figures opposite "total" indicated 99 half-crowns had been deposited, and the figure number 1 showed that for some reason or other no ticket had been taken out for that horse. Any one, seeing and understanding this, would

know that if he deposited his half-crown and took a ticket on No. 1, thus swelling the total to 100, he would, if things remained unaltered till the race was run, and the horse, designated by No. 1, won the race, as holder of his ticket, receive 90 half-crowns. But he would also know the odds were liable to be altered; for example, if 100 persons subsequently deposited half-crowns, so as to swell the total to 200 and none took tickets on No. 1, he would, in the event of No. 1 winning, receive 180 half-crowns; but if 19 of those new depositors took tickets on No. 1, he would, in the event of No. 1 winning, only receive 9 half-crowns; for the total would have to be divided between the holders of No. 1 tickets, by the supposition, now 20. The person, therefore, who, by means of the machine, is induced to part with his half-crown, does so on speculation, his chance of remuneration depending on two events; one, namely, whether his horse wins, determining whether he shall get back anything; the other, namely, how many other gamblers shall have deposited their half-crowns, and on what tickets, determining how much he shall receive in the event of his winning. Over neither event could he by any skill or efforts of his own exercise any control." The learned Chief Justice, after determining that the machine was an instrument "of wagering or gaming at any game of chance," continued: "The second question is whether the wagering carried on is wagering on a game of chance. It was urged in the argument that the betting here, being on the event of a horse race, it could not be considered as wagering on a game of chance, a horse race not properly coming within such definition. * * * The winning of the horse betted upon is of course the primary condition of the wager being won; but whether the winning of the wager shall be productive of any profit to the winner, and more especially what the amount of that profit shall be, depends on the state of the betting with reference to *the number of bets laid on or against the winning horse*—a state of things fluctuating from one minute to another throughout the duration of the betting. *Now this being something wholly independent of the issue of the race, as well*

as of the will and judgment of the winner, depending as it does on the *will or caprice of other persons betting*, is a matter obviously of uncertainty and chance to the individual better, more especially in the earlier stages of the betting. There being, then, *this element of chance* in the transaction among the parties betting, we think it may properly be termed, as amongst them, a game of chance."

Sec. 102. In *State vs. Lovell*, 39 N. J. L. 458, the defendant was charged with operating a lottery for money and selling a lottery ticket therein. He was engaged in the City of Hoboken, New Jersey, in the business commonly known as pool-selling and of disposing of pools, in 1877, on the Jerome Park horse races, in the State of New York. The disposition of pools consisted of three methods:

- 1st. Those known as auction pools.
- 2nd. Those known as French pools.
- 3d. Those known as combination pools.

The auction, French and combination pools were identical in principle, though differing in method. In all the pools the profits to the pool-sellers consisted in the commissions and all moneys invested in pools were left with them until the races were over. In the auction pool the amount the winner received depended upon how much others bet against him and in the French pool and combination pool, the amount won depended on how many others may have bet against the winner and on how many others may have bet as he did.

It was not disputed that all the elements of a lottery inhered in this scheme, except that of chance, but it was insisted on behalf of defendant that whether the person, hazarding the small sum, was to receive a larger one or not, depended not upon chance, but upon his own good or bad judgment in selecting the horse on which he bet.

The Supreme Court of New Jersey, after deciding that a horse race depended on chance so far as the bettors were concerned, added: "There is, however, aside from the result of the race, another element of chance in these games, which is clearly pointed out in *Tollett vs. Thomas* (L. R., 6 Q. B., 514),

and that is the element which determines what the winner is to gain. That element in the 'auction pool' depends upon how much others may bet against him, and in the French pool and combination pool upon *how many others may bet against him* and how many others may bet as he does. None of the *bettors save the last one can possibly learn these matters*. I need not repeat what is said in the case cited as to these ingredients making the transaction a game of chance. I conclude, therefore, that the facts found contain every essential of a lottery, and that the business in which defendant was engaged is plainly within the animadversions of the court in *Den ex Dem. Wooden vs. Shotwell* (4 Zab. 789), as engendering that improvident spirit of gambling which the prospect of adventurous gain usually excites, and having a direct tendency to produce those pernicious mischiefs in a community which the act for the suppression of lotteries was intended to prevent."

The case of *Tollett vs. Thomas* and *State vs. Lovell* have never been criticized by the courts or text writers, but have been cited with approval in many cases and by many authors, and it may be regarded as settled that where the amount of the prizes to be awarded depends on chance and the other essential elements of a lottery are present the scheme is a lottery or similar enterprise.

MYSTERY STORY CONTESTS.

Sec. 103. A short time since it became quite common for publishers of magazines and newspapers to offer large prizes, in one case aggregating \$30,000, to their readers who would most accurately give the denouement of the characters and plot of a serial story of fiction. The competitors were given till all but the last chapter of the story was published to furnish their answers or guesses. The reader, who gave the correct ending of all the characters and plot, received a capital prize while others received prizes in proportion to the correctness of their answers. The Postoffice Department has not hitherto definitely determined whether these contests amounted to lot-

tery schemes or not but in a tentative way simply tolerated them, in their relation to the mails.

The operators of these schemes contended that a reader, after a deep and thoughtful study of the story, ought to see and by the exercise of judgment and reason could see the end from the beginning, but this was found not to be true, because the most thoughtful readers, while they could tell how they thought the story ought to end, felt that in their endeavors to state the outcome given by the author, any answer they might make would be the merest guess which was as likely to be wrong as right. They would be conscious of being in a field where all depended on chance or luck.

When these schemes are critically examined they appear clearly to come within the lottery Act of Congress upon principle and authority. If the contestants are required to determine how the story will end as to one character where there could be several appropriate endings, it would seem there would be as much chance in naming the ending the author had adopted as there was in the case of *Barclay vs. Pearson*, 2 Ch. 154, in guessing the word the publisher of the paper had selected in that case as the correct word to fill the blank in the sentence he gave. No reader could possibly know the ending the author adopts even if the most appropriate ending be required and the chance element would still be present for it would simply be a matter of taste as to which outcome a party would choose; and besides that the stories were called "mystery stories" and the authors usually portrayed unnatural characters, who did unheard of things. But in these contests the characters and plots were so numerous that it was impossible, except by mere chance, to give the correct outcome of all of them. One publisher offered eight hundred prizes of different values which he proposed to award to the contestants, according to the degree of correctness of their answers as to all the characters and plots.

While the publishers who first inaugurated these contests reaped rich rewards, it is believed now that they have run their course and have been abandoned.

WORD CONTESTS.

Sec. 104. Another scheme in the nature of a competitive contest is to make words out of the letters of a given word or words and to give a prize to the competitor making the most words. This the Postoffice Department held was not a lottery scheme. It seems such contest depended on knowledge alone and yet there was found to be much uncertainty about it after all. The operators of the schemes conceded that lexicographers did not agree in every case as to what a word is. There was much controversy also as to whether words that were spelled alike but with different meanings should be counted as distinct words. Some dictionaries contained more words than others and usually the promoter named the dictionary that should control. Proper names were ordinarily excluded from the count and then much discussion arose as to what a proper noun was. A difference of opinion also existed as to what derivatives and what obsolete words should be counted.

One competitor in a contest of this kind suggested to the Postoffice Department that the operator had perpetrated a fraud on him by not awarding him a prize. He stated that he had made 475 words out of the letters in the word given in the case and he did not think it possible to make more words out of those letters. The Assistant Attorney-General for the Postoffice Department wrote to the operator and inquired how many words the successful competitor had made and he replied that he had made 5,000 and that several hundred had made more than 475 each. When the complainant in the case was given this information he was simply dumbfounded and it seemed that where there was such a wide difference in the results of the work of the competitors, there must be so much uncertainty in the legitimate words that could be made as to amount to chance but the promoters of the schemes were not denied the use of the mails and are not yet, though they have about run their course and they are not resorted to now to any

great extent. There is too much work about them to suit the ordinary gambler and they have not been patronized sufficiently to make them remunerative to the promoters. Besides that the competitors who failed did not lose entirely, for they gained immensely in the knowledge of words and of language.

CHAIN LETTER SCHEMES, AS LOTTERIES.

Sec. 105. In the last few years a scheme known as the "Chain Letter Scheme" has become quite popular and has been resorted to by the gamblers and by those who did not scruple to perpetrate a fraud upon a confiding and unsuspecting public. The scheme is this: The promoter writes a letter to some one and states that he desires to raise money for a certain purpose and requests the addressee to send him ten cents or some other small amount and to write a similar letter to a certain number of his friends, the number varying in the different schemes, being three in some, ten in others, etc., all the addressees being requested to forward the required sum to the promoter. Each correspondent, it states, would become the starter or originator of a series and a prize is offered to each of these upon condition that the series, he originates or starts, would continue, without a break, till 10,000 or some other number named, is reached. For instance, A starts a series by writing letters to ten of his friends and thus starts a series and *if* all of his ten friends, *all* of the hundred, that his friends write to and *all* of the ten thousand this thousand write letters to write similar letters to their friends and send the required sum each to the promoter the starter or originator is to receive a prize but if anyone of the ten, hundred, thousand or ten thousand fails to do this the prize is lost. It is very readily seen that the chances of winning such a prize is remote indeed.

In such schemes we have a forcible illustration of the proposition that a prize, dependent on what others may do or not do, is dependent on chance.

The chance feature in such schemes is too apparent to require further comment or elucidation.

COMPETITIVE CONTESTS AS LOTTERY SCHEMES.

Sec. 106. Another class of enterprises has been the subject of much controversy and discussion in the administration of the Lottery Act of Congress in the last few years. This class embraces what may properly be turned competitive contests. The promoters of these contests inform the public, through their advertisements, that those, who buy articles of a certain value, shall receive a ticket or coupon and at the end of a given time the party returning the most tickets or coupons to the promoters will be awarded a designated prize. In other cases the competitors are asked to accumulate and forward to the promoters the coupons upon the wrappers of articles of merchandise and those returning the greatest number will receive prizes. It was vigorously contended that the element of chance was not present in these contests and hence they lacked one of the essential elements of a lottery scheme; but the Post-office Department held that the prizes did depend on chance and refused to allow these schemes to be advertised through the mails. The operators argued that these contests involved nothing more than enterprise, push, industry, and untiring activity, on the part of the competitors and that the competitors could by the exercise of these business qualities unerringly control the result. Upon examination, however, this argument was found to be specious and fallacious. In the first place no competitor knows or can know how many have entered or will enter the contest against him and in this respect he must work in the dark. In the second place the conditions under which the competitors operate are different and varied. One competitor may operate in a town of 10,000 inhabitants without opposition from anyone else, striving for the prize in the same territory. Another might be compelled to work in a field having only 5,000 people and in competition with half a dozen others or more. While still others might have to work in the fields that had already been supplied with the article sought to be sold or where the people had been in the habit

of using another variety of the same article. And these conditions vary to such an extent that the chances of the competitors winning could not, in any proper sense, be called equal or said to be dependent on push and industry. In the third place no competitor could know how long to work or when to stop. He could not know whether he would have to work one hour a day for one day or eighteen hours a day for thirty days or whether he would have to devote his whole time or only a part of it to the business to enable him to secure one of the prizes; and if he should work for eighteen hours a day for thirty days he could not be sure of winning the prize, because he does not know and can not know the conditions favorable and unfavorable, under which the other competitors work.

A firm in the City of New York offered \$3,600 in monthly prizes, aggregating \$42,000 a year to those who would return to it the most coupons found on the wrappers of their soap, giving first, second, third, etc., prizes. The firm insisted that this was not a lottery scheme but a perfectly legitimate transaction but the Department held otherwise. An analysis of the scheme will clearly show its wagering character and its chance features. The firm had by experience proved that by this method it had increased its business so enormously it could afford to pay \$42,000 annually in prizes on the contingency named. It was admitted that the returns made by competitors varied from 10 to 2,000, which showed that those who performed the work had no conception of the number of coupons that would take a prize of any grade but all sent in their coupons and took their chances in the scheme.

Suppose 10,000 competitors entered one of the monthly contests and one competitor returned 2,000 coupons, another 1975, another 1950, another 1925 and another 1900, making 9750, and these five drew the first, second, third, fourth and fifth prizes and these were all the prizes offered and the 9995 competitors returned on an average 1,000 coupons each but no one reaching as many as 1,900, thus making for them all 9,995,000. Now the 10,000 earned or were supposed to have earned the \$3,600 distributed for that month in proportion to

the number of coupons returned by them respectively or .0003598 of a cent for each coupon. In that case the five winners of the prizes earned \$3.50 (within a fraction) and the other 9995 earned \$3,596.20 (within a fraction) and yet the whole sum of \$3,600 was handed over to the five and the 9,995 got nothing. How can such inequality among competitors be reconciled with the theory that the transaction was perfectly legitimate and the elements of gambling and chance were not present? Ten thousand men, women and children worked for a month spending their time, energies and money too, to increase the sales of the firm's soap and confessedly all combined earned \$3,600 for the firm and five of the competitors pocket the whole sum and the other 9,995 get nothing. And the inequality among the five winners even, according to the plan, was out of all proportion to the number of coupons returned by them respectively. Such inequality of distribution of profits earned must depend on chance and appeal for success to the gambling spirit of the people alone. The firm proposed to modify the plan of operations so as to give certain commissions for all sales of the soap or a prize to everyone returning a given number of coupons but still retaining the feature to give the \$3,600 to those who would return the most coupons which it was contended would eliminate the chance element and make the transaction legitimate but it was held that this failed to accomplish the result claimed for it. Each person had something definite to work to to get his commission or his prize for a given number but as to the distribution of the \$3,600 he was compelled to proceed in the dark and take his chances of winning; and as to the \$3,600 the scheme stood precisely where it did in the first place. As was said by the Supreme Court of the United States in the Horner case there is an element of certainty, that is, the certainty of receiving commissions on the coupons returned or of receiving a prize for the return of a stated number of coupons, that goes hand in hand with an element of chance, that is, the chance of participating in the distribution of the \$3,600. This proposition is supported by all the adjudged cases. Here again it may be

said that probably no gambling scheme is more successful than contests of this kind, for they seem so plausible and so much like a contest of effort, that all classes of people, irrespective of creed or faith, enter into them, but when the results are considered, no species of gambling, probably, is more thoroughly oppressive than these schemes and it can be readily imagined what disappointment comes to the 9,995 competitors of all ages and sexes, scattered in every hamlet, town and city in the country, when they learn that after all their work they are to get no part of the \$3,600, and that conscience must indeed be seared that can hand over the earnings of 10,000 to five persons and pocket the profits earned almost wholly by the labor, efforts and industry of the 9,995 competitors, whom they turn away with nothing. They in fact hire 10,000 people to work for them and instead of paying them according to what they earn, they distribute the earnings of all to five and give the others nothing and even make an unjust discrimination among the five.

Sec. 107. In *Lucas vs. Wallace*, decided in 1891, it was held by the Illinois Court of Appeals (42 Ill. App. Reps. 172) that "an agreement in advance of an auction sale of stock to present a cow to the bidder who would buy the most stock does not constitute a lottery and against public policy. The Court held that the present of the cow "was a fair premium offered to stimulate bidders and not unfair or against public policy."

This case is not in conflict with the ruling of the Department on this class of schemes. All the elements of chance above named are wanting in the Illinois case. In that case the competitors were all present at the auction sale, the amount of stock to be sold was known and the amount of money required to buy it all could be estimated in advance, the opportunities for bidding of all those who chose to enter the contest were equal, and after the sale of an animal each competitor could determine how he stood in the contest and it seems if anyone failed to receive the prize it was not because he could not but because he would not control the result. It seems the

prize there did not depend on chance in its gambling sense but depended on the purchase of the most stock by the successful competitor.

Sec. 108. In *Holt vs. Wood*, 14 Penn. C. Ct. Reps. 499, it was held that a proposal made by the owners of suburban lots to pay a large sum of money to the person who suggests the best name of a village to be built on the lots, the choice of names to be determined by a committee is not within the lottery act of Pennsylvania.

The court there thought the scheme bordered pretty closely on the idea of a lottery, but added: "The prize was not to be determined by lot, nor, strictly speaking, by chance. Of course there was a chance whether the suggestion of a name would win the prize, but the distribution of the prize was not by chance; that was to be determined by a committee, who would select the name from all those suggested which, in their judgment, was most euphonious or appropriate." Nothing in the case indicated *how* the name was to be selected.

The owners of the lots stated in their advertisement, however, that if more than one suggested the name that should be chosen the prize should be awarded to the party who first sent in the name, and the court held that this was illegal and that each person sending in the name that was selected should get the same sum.

Sec. 109. It was held by the Post Office Department that where a prize was offered to a party, who would suggest the name for a paper, that a committee might decide to be the most appropriate, the prize depended on chance and the scheme was a lottery. In such a case the selection of a name for a paper would depend on the taste or whim of the committee and as no one could foretell or foreknow what name would be chosen, chance, in its gambling sense, inhered in the scheme. The method of choosing such a name is the same in principle as was the method of determining the winners of prizes in *State vs. Short*, 3 Vroom, 399, where it was held that the awarding of a prize to a person, whose appearance the promoter liked, depended on chance.

In contests of this kind the distinction between a legitimate and a gambling transaction must be kept constantly in mind. It is not doubted but that a party might, in a legitimate way, offer a prize for the best name for a paper or village or anything else, the name to be selected by a committee, but when the offer involves the element of wagering or gambling, the transaction amounts to a lottery or similar enterprise. In one case the party, offering the prize, desires to get the best name for his purpose, while in the other he desires to make money and the name is of no importance or at most of secondary importance. In the one case the competitors pay nothing, except their services, which are of no value to the offerer of the prize, to enter the contest, while in the other they are required to pay money or give their services for the purpose of increasing the pecuniary profits of the promoter of the scheme.

Sec. 110. But the Court of Appeals of the District of Columbia in *Lansburg vs. The United States*, 11 Appeal Cases (D. C.), 512, went further than the Department ever went.

In that case it appeared that the Trading Stamp Company, of Washington City, entered into a contract with certain merchants, by which it was provided that the company was to print and deliver at the homes of the people of that city 100,000 copies of a book containing the names of the merchants entering into the contract and giving details how certain prizes might be obtained. The merchants agreed to receive and buy from the company a sufficient number of trading stamps at fifty cents per hundred to supply their customers, the customers being entitled to one stamp for every ten cents worth of goods bought. The customers were required to paste the stamps received on the numbers contained in the book, mentioned, and when they had received 990 stamps, from one merchant or all the merchants, advertised in the book, the customers were entitled to their choice of a large variety of magnificent premiums carried in stock by the company, consisting of the richest designs of silver wares, books, pictures, clocks,

lamps, furniture, bicycles, opera glasses, cameras, musical instruments, gold rings, etc. The Stamp Company was not engaged in the mercantile business but its business was to sell the stamps, print and distribute the books and furnish the prizes.

After citing *Yellowstone Kit vs. State*, 88 Ala. 196; *Long vs. State*, 74 Md. 565; *People vs. Gillson*, 109 N. Y. 395, and *Commonwealth vs. Emerson*, 165 Mass. 146, the Court of Appeals of the District of Columbia stated that it was not necessary to approve or disapprove the doctrine of these cases or determine whether the acts named in the case constituted the conduct of a lottery or gift enterprise, or even of finding that the element of chance operates intentionally or distinctively in the scheme of the Stamp Company, but the court thought the scheme came clearly within the meaning of a gift enterprise as used in sections 1176 and 1177 of the Revised Statutes of the District of Columbia. The court said: "The stamps are sold at the rate of fifty cents per hundred to the contracting merchants, and yet purport to be redeemable, with premium gifts, at the assured value of one dollar per hundred. Unless, therefore, the so-called premiums, to be redistributed among the diligent collectors of stamps, are greatly overvalued, the scheme can not maintain itself, for in addition to the actual cost of the premiums, it has to bear the cost of the books and stamps and the maintenance of its office and exhibition room. If its premiums should have any fair value, then the stamp company must inevitably rely on the failure of the presentation of the tickets for redemption by reason of its requirement, that not less than 990 tickets—representing cash purchases of \$99—shall be pasted in a book and produced at one time, to entitle the holder to his premium. In this event, the company, if it actually contemplates making good its contracts, is relying upon a lottery; that is to say, the chances and advantages of its game for its expectation of profit or gain."

Here the court apparently decides that the chance element inheres in a scheme of this character, if it manifestly be based on the theory that a large number of the competitors

will fail to comply with the conditions, by reason of which the operator will be enabled to award the prizes of the value he proposes to give. The court laid stress upon the fact that the Trading Stamp Company was not engaged in the mercantile business and that all it did was to prepare the device, put it in operation and furnish and distribute the prizes. The court thought such a scheme, operated in such a way, was either a fraud or a lottery. If the prizes were not of the value stated the scheme was a fraud and if the prizes were of the value stated and the company could afford to award such prizes simply because a large number of the competitors would fail to comply with the conditions, the scheme amounted to a lottery. While it seems this decision is not supported by the rulings of the Post Office Department and the weight of the adjudged cases the following points in its favor may be noted: First. In the case of *Long vs. State*, 74 Md. 565; *People vs. Gillson*, 109 N. Y. 389, and *Com. vs. Emerson*, 165 Mass. 146, the parties who offered the prizes were themselves dealers in the articles of merchandise which were kept for sale, and a prize went with each purchase, while in the *Lansburgh* case the party offering the prizes was not a merchant but simply devised and operated the scheme and furnished and awarded the prizes, and the competitors were required to purchase at least ninety-nine dollars worth of goods each and present the stamps for the same before they became entitled to a prize. Second. If experience shows that in the regular course of business a large number of competitors for prizes in schemes of this character fail to comply with such conditions as were prescribed in the case under review, either for lack of ability to comply or other cause, by reason of which an operator can afford to award valuable prizes to the persistent competitors and this experience is the foundation stone for the scheme and the operator has no connection with the plan of operations except to devise and advertise it and furnish and distribute the prizes, it may be asked whether there is not present the element of gambling certainly and probably the element of chance, that is, the

chance depending on the number that fail to comply with the conditions. The definition given by Mr. Attorney-General Harmon in the opinion, examined in another place, to the effect that a lottery covers "any determination of gain or loss by the issue of an event which is merely contrived for the occasion." That is the gain of those who receive prizes and the loss of those who fail is determined "by the issue of an event contrived for the occasion," only. And this proposition seems to find some support in the Bond Investment cases where the persistent members had an advantage over those who permitted their obligations to lapse and especially in *McLaughlin vs. The National Mutual Bond and Investment Company*, 64 Fed. Rep. 908, in which Mr. Justice Dallas observed that, "The interesting question to those who participate in it (the scheme of the company) is one of fate and nothing else. It is this; which of those shall be forced to forfeit or so 'fall in fortune's strife;' and which of them, surviving that catastrophe, will have obtained redemption of their bonds before the final and inevitable collapse occurs?" But there are marked differences in the plan of operation in such a scheme as was involved in the *Lansburgh Case* and the Bond Investment Schemes. In the former success or failure depended alone upon the competitor himself, while in the latter success or failure depended more largely on what others did, that is how many other members would come in, stay in and continue to pay their dues; and in the former there was no juggling with figures, while in the latter the numbering of the obligations was so manipulated that some of the members were favored by chance to the injury and loss of others.

For a discussion of the distinction between the transaction in which a prize may be offered for a legitimate purpose and schemes which involve the element of a wager the reader is referred to Chapter II, *Ante*.

LOTTERIES DEPENDENT UPON THE RESULT OF OTHER LOTTERIES.

Sec. 111. In *Wilkinson vs. Gill*, 74 N. Y. 63, the defendant opened a shop in New York in which he sold the right

to select tickets in the Kentucky Lottery. If the numbers selected came out in the drawing in the Kentucky Lottery the adventurers in defendant's scheme won, otherwise they lost. The statute of New York provided that a person purchasing an interest in an illegal lottery might recover double the sum of money paid. (1 R. S. 667, S. 32.) The plaintiff sued for money expended in the scheme above described. This was called "playing policy." Section 26 of the same statute provided that "every lottery, game or device of chance in the nature of a lottery, other than such as have been authorized by law, shall be deemed unlawful." The court said: "This statute evidently intends to treat every game or device of chance in the nature of a lottery as a lottery and the use of that word would include all its relatives specified in the description. The word 'lottery' has no technical legal meaning. It must be construed in the popular sense and with a view of remedying the mischief intended to be prevented. * * * Conceding in this case the interest purchased was not an interest in the Kentucky Lottery (which is not clear) that would not, it seems to me, change the substantial nature of the transaction. For a small sum the plaintiff was entitled to a much larger sum, depending upon the result of the drawing of the Kentucky Lottery. Whether that sum came from the Kentucky institution or from the defendant, or anyone else, was immaterial. If the drawing in the Kentucky Lottery was adopted, as the wheel of fortune, although the prizes were furnished by others, the character of the transaction was not changed. * * * If the defendant had set up a wheel of of his own and sold numbers, which, if drawn, would represent prizes, he would have had a lottery and whoever purchased numbers which were to be drawn would purchase and would have an interest in a lottery. Is the circumstance, that the Kentucky drawing was adopted, material in determining the character of the act done? Was it not a game or device in the nature of a lottery? It was a practice which is within the very mischief and evil intended to be remedied. It matters not by what name it is called or what terms are used, it has all

the essential features of a lottery and should be so construed. It is said the transaction is a wager or bet, that certain numbers will be drawn and is, therefore, not a lottery. This does not follow. Every lottery that has the characteristics of a wager or bet or device in the nature of a lottery is not excluded from the operation of the statute because it partakes of the nature of a wager.

The courts have uniformly looked beyond the mere form or device of the transaction and sought out and suppressed the substance itself. *Govs. of Alms House vs. Amer. Art Union*, 7 N. Y. 228; *Hull vs. Ruggles*, 56 Id. 424."

Sec. 112. The case of *People vs. Elliott*, 74 Mich. 264, involved precisely the same question. In the Kentucky Lottery thirteen numbers were drawn daily which determined the right to prizes ranging in value from \$80 to \$4,000. The numbers drawn in Kentucky were telegraphed to Elliot in Michigan who used them for a basis in his dealing. The adventurer would pay Elliot a sum of money to select numbers. If he selected two it was called a saddle, if three, a gig, and if four, a horse. If all the numbers the players selected were drawn in the Kentucky Lottery he won, otherwise not. Elliot was held to have set up and promoted a lottery for money within the meaning of section 9331, Howell's Statutes. Here, as in the *Wilkinson-Gill* case, it was claimed that, as Elliot had no drawing, he was not operating a lottery, but the court held otherwise, saying: "A lottery is a scheme by which a result is reached by some action or means taken and in which result man's choice or will has no part, nor can human reason, foresight, sagacity, or design enable him to know or determine such result until the same has been accomplished. It was the obtaining of money or property by such means that our statute was intended to prevent and punish and I think the case before us falls clearly within the statute. If the respondent had drawn the thirteen numbers from the seventy-eight at his place of business in Detroit there could be no doubt but that the scheme would have been regarded as a lottery and within the terms of the statute. It is difficult to see why the selecting

and selling of three or more of the thirteen numbers would not be equally within the statute, if they were to draw prizes, if it was not necessary for the drawing to be done within the state to constitute the offense, and this, I think, was necessary. How. Stat., sec. 9335. It is not the drawing of the lots, but the disposing and selling of the chances that brings the case within the statute. It is promoting the lottery for money by paying the money for the chance of receiving more."

Sec. 113. In *Smith vs. State*, 11 Atlantic Rep. 758, the defendant was indicted for selling a lottery ticket. The proof showed he had sold pieces of paper commonly known as "policies" which entitled the purchaser to receive money on the happening of a certain contingency dependent upon the drawing of numbers in a lottery. The Court of Appeals of Maryland held that these policies were lottery tickets, under the Maryland statute, which required the courts to "adjudge all tickets, parts of tickets, certificates or any other device whatsoever by which money or any other thing is to be paid or delivered on the happening of any event or contingency in the nature of a lottery, to be lottery tickets."

LAND LOTTERIES.

Sec. 114. In *U. S. vs. Olney*, 27 Fed. Cas., p. 234, the action was brought to recover the sum of one hundred dollars alleged to be due the United States from defendant as a special tax for engaging in the business of a lottery dealer. The evidence showed that the defendant, being the owner of six hundred town lots, divided them into parcels; three hundred of such parcels consisted of one lot, each of not less than fifty dollars value; the other three hundred were denominated prize parcels and consisted of two, four and six lots, each of the value of fifty dollars, and single lots varying in value from \$100 to \$600; one house and lot of the value of \$1,000; and one cottage and three lots of the value of \$5,000. The lots were sold at the uniform price of \$50 each, and were awarded to the purchasers by drawings.

The court, holding the scheme to be a lottery, decided the following points:

First.—That it made no difference that each adventurer got something in return for his money or that he might receive full value of his money in any event.

Second.—That each adventurer purchased an interest in the property and at the same time a chance for a prize.

Third.—The certificates of purchase issued to the purchasers of lots constituted lottery tickets.

Fourth.—That the purchasers did not become tenants in common of the lots, but each bought the right to have, by allotment, one of the three hundred lots estimated to be worth fifty dollars each and the chance of obtaining instead of such lot one of the three hundred prize parcels represented to be worth from one hundred dollars to five thousand dollars.

The court, in answering the argument of the defendant that the purchasers bought the 600 parcels in common and, after thus becoming the owners of the same, adopted this method of dividing them among themselves, said: "If persons already owning family plate, pictures, or other property, not susceptible of division or even equal division, choose to distribute by an appeal to lot what has thus come to them before they had any scheme of so distributing it, they are not within the definition of a lottery nor liable to this special tax. They have not given a valuable consideration for the chance of obtaining something of much greater value—a prize.

The argument of the defendant is ingenious and plausible, but it is based upon an incorrect assumption. It ignores the fact—the mainspring of the whole transaction—that the tickets were sold and purchased for the avowed purpose of giving to each of the purchasers a chance to obtain a prize parcel by means of this subsequent allotment. The division by lot was not an after thought of the purchasers but a prominent part of the original scheme of sale and distribution as prepared by defendant."

The learned judge, deciding this case, makes here the distinction between acquiring property by lot and dividing property, already owned, by lot. The former would be a lottery and the latter would not. This distinction is based on the theory that in the former case the owners could not be regarded as giving a valuable consideration for the chance of a prize. But do they not give a consideration in that each one stakes his share or interest for the chance of obtaining the whole? It seems that in such case the division of common property by resorting to chance in any form would at least amount to a wager or bet, whether the property be acquired with the intent to so divide it or not. Property can be divided into lots of as equal value as possible and the lots thus divided may legitimately be awarded to the respective owners by chance, without bringing the scheme within the meaning of a lottery, and the same may be said of an heirloom or other article capable of division where the interests of each owner may be estimated on an equitable basis in money and then it may be determined by lot who shall have the article by paying the others for their interests.

In a practical sense this decision has operated to the injury of the public morals. Gamblers have seized upon it and have so planned their schemes that ostensibly and so far as the obtainable evidence went they came within the principle there laid down; and many schemes were advertised through the mails, the true character of which could not be ascertained until after the distribution of the property had actually taken place.

The schemes on their face made the adventurers owners in common of the property and all plans for final division were concealed but when the wind up came it became manifest that a distribution by lot or chance was intended from the inception of the schemes. The history of this case is another illustration of the adage: Give a man an inch and he will take an ell, or as it should read as applied to gambling: Give a gambler an inch and he will take a mile.

There would be nothing pernicious in the Olney case if it could always be made plain what the original intent is in regard to a division of property, but unfortunately this can not be done and it gives gamblers a covert in which to conceal their wagering transactions.

Sec. 115. In *Branham vs. Stallings*, 21 Colorado, 211, 52 Am. St. Reps. 213, the record showed that certain parties organized the "Denver Lot Club" and entered into an agreement, by the terms of which they were to pay two dollars weekly and drawings were to be had every Monday. One of the parties drew a lot at the first meeting, which cost him only two dollars; one drew a lot at the second meeting which cost him only four dollars, and so on. The drawings were to continue for sixty weeks. It does not appear in the report of the case that those drawing lots ceased to pay their weekly dues but it is probable they did. This was held to be a lottery by the Supreme Court of Colorado.

Sec. 116. The Shelbyville Real Estate Company advertised that on a certain day a sale of lands to the amount of 150,000 acres by the company would take place; that upon this amount of stock the company had issued 50,000 shares, which would be sold at three dollars each and the company would distribute the property among the shareholders by the numbers of their certificates under the management of responsible gentlemen. The number of prizes was stated to be 3,329, the number of tickets or shares being 50,000.

This was held to be a lottery scheme in *Swain v. Bussel*, 110 Ind. 438.

Sec. 117. In *Wooden vs. Shotwell*, 23 N. J. L. 470, Wooden had divided a parcel of land into 58 lots of unequal value from \$50 to \$600 per lot and disposed of them at \$75 each and the particular lot of land to which each person was to receive a title was to be determined by lot. The supreme court of New Jersey said this was, both in form and substance, a lottery. "The difference in that case and the present is merely in degree of advantage or disadvantage of the parties

in the amount to be paid and the proportionate values to be received as between those who make the payments. The method of distribution in either involves the objectionable feature of chance upon the choice of property of higher or lower value and greater or less price and is determined without the exercise of will and judgment of the parties. The manner in which the chances in this case were determined is even more objectionable. Here, 47 lots were made the subject of choice for the selection of but 35 lots and thereby added to the objection of distributing 35 lots by chance the further vice of placing the appellant's remaining 12 lots in the scale, with locations, character and values all depending upon the result of the drawing."

This scheme was again before the same court in *Den. ex Dem. Wooden vs. Shotwell*, 24 N. J. L. 789, where it was contended that the plan adopted was merely to make partition among the purchasers. The court held that they did not receive deeds until after the drawings and the court further held that the scheme was a lottery, and that "the plan was a contrivance for the distribution of prizes by chance; a reliance upon the result of hazard; a decision of the values of the adventurer's investments by the favors of fortune."

Sec. 118. In *Chaney Pork Lard Company vs. Hart*, 73 N. W. Rep. 1059, the record showed that Pearce, Denham and Barker undertook to induce the Iowa Packing Company to erect a pork packing and beef killing plant at Clinton, Iowa, and, in order to obtain a site therefor, and to pay a bonus, entered into a contract with Allen and Hall for the purchase of 96 acres of land, with the condition that the grantors should plat a part of it into lots and streets and execute an agreement for the conveyance of the lots at the price of \$300 each to the purchasers, as directed by the grantees, in the event that 225 lots were sold. The grantors agreed to take 16 lots at the price named. It was agreed that the lots should be apportioned among the subscribers in such a manner as they should decide. The subscribers met and agreed upon a plan

of allotment. A drawing committee was appointed and the names of all subscribers placed in a box and the numbers of the lots were put in another box. The names and lots were drawn and the person got the lot that was drawn to correspond with his name. The lots varied in value though none of them was worth more than the price agreed to be paid. The suit was brought to foreclose the contracts for the purchase of the lots and the defendants interposed, as a defense, that the method employed in distributing the lots constituted a lottery, and hence the contract was obtained by fraud. The court found the promoters wanted nothing to do with the meeting of the subscribers and that the method of apportioning the lots and the apportionment thereof were determined upon and carried out by the subscribers alone. The Supreme Court of Iowa said: "The sale of the lots to the subscribers in this case was not in pursuance of any design to promote a lottery or in evasion of the law. Each subscriber contracted—as he had a right to do—for the purchase of one of the lots, with the understanding that they should be apportioned as the subscribers themselves might determine. Having agreed to buy before the land was platted—induced by a desire to aid an enterprise of an anticipated advantage to the city—they concluded * * * to make the selection of drawing the number of a lot and a name from different boxes at the same time. We know of no good reason why these purchasers did not have the right to divide their property, according to their own notions and agreement. We have discerned no authority denying them that right, but, on the contrary, it is recognized in *Com. v. Manderfield*, 8 Phila. 457; 2 Whort. Crim. Law, S. 1891; *Yellow-Stone Kit vs. State*, *supra*. Joshua so apportioned the promised land among the seven tribes of the children of Israel. The disciples of Christ chose Mathias to succeed Judas by casting lots. Under the laws of this State the right to an office is determined when there is a tie vote by the same method. Code S. 1169. There was nothing in the transac-

tion opposed to good morals, and it was not a lottery within the meaning of the law."

Sec. 119. In *Paulk vs. Jasper Land Company*, 22 So. R. 495 (June 16, 1897), the defendant offered lots in a town of 3,000 lots for \$100 each, the lot each one was to finally get a deed for was to be drawn by means of numbered cards and the party was also to get paid up stock for one half of the amount he paid for lots in future corporations to be created, and into which 50 per cent of the money the promoter received was to be invested. The Supreme Court of Alabama held this to be a lottery and that a party paying money on this scheme could not recover it back on the ground that it was a gambling transaction under section 1742 of the Code of that State. The Court said a lottery was gambling.

Sec. 120. In *Seidenbender vs. Charles*, 4 Sergeant and Rawle, 151 (8 Am. Dec. 682), which was a suit on a note to be paid "on the delivery of a deed in fee-simple to the drawers of the note for such lot of land, as shall be drawn against certificate No. 102, purchased by them in the town of Blue Rock," the evidence showed that a party, possessed of a tract of land, on the banks of the Susquehanna, divided it into town lots, which he sold for \$330 each, the specific lot to be awarded to each purchaser by lot. The lots were of very unequal value. One, on which the dwelling house was erected, was valued at \$11,000. Another, having a barn on it, was valued at \$3,000. Two others had wooden buildings on them. The lots, abutting on the river, were peculiarly valuable, but the great mass, which lay back from the river, and were unimproved, bore no proportion to the price at which the tracts were sold.

The defense was that the note was given for the purchase of a ticket in a lottery and as opposed to this defense, it was contended that the transaction was merely a sale of a tract of land, for an adequate consideration, not forbidden by law, and the distribution of the lots to the purchasers was simply a partition of land among tenants in common. The Supreme Court of Pennsylvania decided the scheme was a lottery. Chief Justice Tilgman, in his opinion, in reply to the contention that

the distribution of the lots was simply a partition among tenants in common, said: "But this is directly contrary to the truth; for until the lottery was drawn, no purchaser had any right to any part of the land; and when it was drawn, they took very unequal interests designated by the chance of the wheel. When tenants in common make partition, they are seized of the whole estate before partition, and the object of the lot is to assign to each his particular portion, the whole having been previously divided into parts, as nearly as possible, of equal value. The two cases are so extremely dissimilar that the mind is struck with the difference, before it can frame an argument to prove it."

Sec. 121. The sale of lots of equal value to be designated by a committee of citizens on fair grounds was held by the Court of Appeals of the Second District of Illinois in *Lander vs. P. A. and T. Soc.*, 71 Ill. App. Reps. 475, not to be a lottery. The court remarked that "the real substance of the transaction probably was a subscription to appellee for its corporate purposes."

Sec. 122. In *Elders vs. Chapman*, 176 Ill. 142, a syndicate was formed for the purchase of certain lots under an agreement, providing that there should be as many shareholders as lots; that after all the shares had been sold, the lots should be assigned to the shareholders under the direction of a board of directors, elected by the shareholders; that the directors should receive bids for the choice of lots, the highest bidder to make his choice; that bids should then be received for the choice of lots remaining unselected, until there appeared to be no other choice, when the remaining shareholders should draw by lot for the remaining unselected lots. The Supreme Court of Illinois, in October, 1898, held that this scheme was not a lottery. The Court asserted that there was a wide difference between a division of property by lot and a lottery, and that joint owners of property might make partition of it by lot, having first divided it into as nearly equal parts as possible, and that in the case before the court the parties, getting choice of lots, had to pay for it and what they paid

went to all the investors but when no one would bid for a choice, there was no difference in the value of the unselected lots and that they, then being of equal value, could be distributed by lot.

Sec. 123. In *Lynch vs. Rosenthal* (Sup. Court Ind., Feb'y 21, 1896), 42 N. E. Rep. 1103, and 31 Law Rep. Ann. 835, Lynch laid off a tract of land into 54 town lots. He offered for sale forty-eight of the lots including a prize lot at prices varying from \$100 to \$300, according to class and location, but he sold only thirty-five of them. Forty-seven numbered slips were placed in a box and the names of thirty-five purchasers in another, and these were drawn out, one out of each, and the person whose name was drawn was to get the lot whose number was drawn at the same time. Deeds were to be made out after the drawing and at that time one-half of the purchase money was to be paid and the other half when Lynch should erect and put in operation a furniture factory near the lots. The "prize lot" was to be given away and its award was to be made in some manner to be agreed upon by the parties interested. In a suit against one of the purchasers to enforce the contract the scheme was held to be a lottery. The Court said: "Whether he (the purchaser) was to pay \$100 or \$300 was a question over which he had no choice. * * * Any advantage in the selection by reason of location, character, size or condition of the lot from any of the various classes, as arranged by the prices marked, was not to be determined by the judgment of the subscriber or the seller, but depended wholly on the chances to be settled by the lot. Distribution by chance was never more certainly contemplated, and if not so contemplated the manner in which the appellee's alleged purchase was determined was never outrivalled as a method of chance nor even by the guessing upon the number of beans in a globe for, in that instance, the person to be benefited exercised his own judgment in determining upon a number." The Court, after citing the case of *Hudelson vs. State*, 94 Ind. 426, continued: "The method adopted was no less objectionable as one of mere chance than the methods of the old Louisville

Library Association or the more recent Louisiana Lottery.

* * * In this case the subscriber is to get a lot more or less valuable depending alone upon chance; and he is to pay for it a sum more or less depending alone upon chance. * * *

Here 47 lots were made the subject of choice for the selection of but 35 lots and thereby added to the objection of distributing 35 lots by chance the further vice of placing the appellant's remaining 12 lots in the scale, with locations, character and values, all depending upon the result of the drawing."

The scheme in the case of *Ridgeway vs. Underwood*, 20 Fed. Cases, 760, was similar to that in *U. S. vs. Olney* and it was also held to be a lottery.

Sec. 124. In *Washington Glass Company vs. Mosbaugh*, 49 N. E. Rep. 178, the record showed two contracts, which were construed together. 1. A contract between the Cicero Improvement Company and Mosbaugh and others; and 2, a contract between the Washington Glass Company and the Cicero Improvement Company. In the contract first mentioned, it was recited that the Improvement Company was trying to locate one or more factories and, as an inducement to such location, it proposed to lay out a tract of land into town lots and to encourage such location the subscribers agreed to take the number of lots set opposite their names at a price not to exceed \$200 per lot. The contract contained this stipulation: "This agreement is made on the express condition that one or more factories shall be located in the said town (Cicero). The lots hereby contracted for shall be apportioned and located for each subscriber as the subscribers hereto shall agree when said lots are laid out in proportion to the amount paid for such lots by the subscribers." The second contract provided that the Glass Company should build on certain land one 16-pot glass-bottle factory, that it was to employ not less than 150 hands, that the weekly pay roll should not be less than \$1,500 and that it was to lay out and plat certain lands into town lots and that the Improvement Company was to procure the sale of 150 of said lots at an average of \$200 per lot. This contract further

provided that the purchasers were to make selection of the lots in pursuance of the contract under which the subscription for such lots had been made. The Glass Company laid out the town, built the factory, employed 150 men and paid out over \$1,500 on its weekly pay roll. The subscribers for lots met and, after much discussion, agreed to put strips of paper, each strip bearing the name of one subscriber, into a receptacle, and the same drawn out by a committee, the first name drawn out to have first choice of lots, the second the second choice and so on. After the drawing was over, the parties repaired to the town site to select their lots. Mosbaugh's name having been the 79th drawn, selected lot 25 and took possession and the other subscribers made their selections also. The lots drawn were of unequal value but it was shown that the Glass Company had nothing to do with the method adopted for the apportionment of the lots among the subscribers. Mosbaugh, having failed to pay for the lot he selected, the Glass Company sued him for the balance due. One of the defences he interposed was that the scheme was a lottery and for that reason no recovery could be had.

The Supreme Court of Indiana held, however, that the Company could recover because it appeared that it was not in any way responsible for or connected with the unlawful scheme of Mosbaugh and others and that the contracts themselves were not tainted with any vice that would vitiate them. The Court further remarked that the Glass Company, relying in good faith upon the terms and conditions of the contracts, proceeded to erect the factory and invest its money, employing 150 men and paying out weekly more than \$1,500.

The Court cited the case of *Lynch vs. Rosenthal*, 144 Ind. 86, 42 N. E. Rep. 1103 and approved the doctrine there laid down.

GUESSING CONTESTS IN CASES WHERE STATISTICS ARE TO BE CONSIDERED.

Sec. 125. In *Hall vs. Cox*, 1 Q. B. (1899), page 198, the record shows that the publisher of a paper, called the *Rocket*, offered a prize of £1,000 to its readers for a correct prediction of the number of male and female births and the number of deaths in London during a specified week. The competitors were required to give their estimates on vouchers published in the paper and they were not limited to one prediction. Consolation prizes were offered, under the same conditions, for correct predictions or approximations to the number of male and female births and deaths respectively. On appeal to the Court of Appeals this scheme was held by Justices Smith, Rigby and Collins not to be a lottery, following *Caminada vs. Hulton* (1891) 60 L. J. (M. C.) 116 and *Stoddard vs. Segar* (1895) 2 Q. B. 474. Smith, L. J., said: "The result, no doubt, depends largely on chance but not entirely and the cases show that to constitute a lottery it must be a matter depending entirely upon chance. There is an element of skill in the inquiry in this case dependent on the investigation of the returns of the previous years and the conditions of the increase of the population, the death rate and such like statistical investigations."

Sec. 126. Here, as in the news paper case decided by the Attorney-General and the *Toronto* and *New Brunswick* cases, the Court loses sight of the fact that each guesser reaches a point in his estimates where he realizes he is in the field of speculation and chance and especially in this case that the guesser had to give the exact number of female births, male births and deaths before he could receive the £1,000 prize. In such a case the probabilities of losing are greatly increased. Suppose there were only two numbers in the female births, two numbers in the male births and two numbers in the deaths, then the guesser would not have sufficient data to enable him to determine which of the two in either case he ought to name. The chances of naming the correct

number in each class would be even, but the chances of his naming the correct number in two classes would be one in four and in three classes one in eight. Cham. Encyc., Title "Probability, The Mathematical theory of," and Ency. Brit. Same Title.

But the numbers about which the guessers would have doubt would be largely in excess of two and in such case the chances of naming the correct number in all three classes might amount to thousands.

The promoter of this scheme evidently thought the result of the contest depended entirely on chance. This clearly appears from the fact that he offered a prize of £1,000 (\$5,000) to the winner and from the further fact that he gave each contestant as many guesses as he saw proper to make. He realized that the probability of an absolutely correct guess as to the number in the three classes was so remote that he could afford to take the risk he did take and the prize was so large the people would be induced to spend large sums of money in the aggregate to win it. Besides the capital prize offered to the person making an absolutely correct prediction he offered consolation prizes (to be determined by him) for approximations to the correct number.

This was unquestionably a gambling transaction and the prize was made dependent on chance in its gambling sense and according to the course of decisions in the United States it was a lottery scheme.

Sec. 127. A newspaper advertised an enterprise or scheme by which it offered to give the sender of the first guess, giving the correct or nearest correct number of votes of the Democratic and of the Republican candidates, respectively, for the office of Secretary of State for the State of Ohio at the election next ensuing, \$100 each; and to the sender of the second correct or nearest correct guess (if no correct guesses should be received) of the vote of either candidate, \$50 each; and to the sender of the third correct or nearest correct guess (if no correct guesses should be received) for each candidate

\$25; and \$5 each to the senders of the next fifteen correct or nearest correct guesses (if no correct guesses should be received) on each candidate thus offering to give the sum of \$500 to thirty-six persons. The guesses were to be made on blanks, cut from the paper. The Attorney-General of the United States, Hon. W. H. Miller, in passing on this scheme, on Jan. 24, 1890, held that the award of the prizes did not depend either on lot or chance. The General used this language:

"It will hardly be contended that the enterprise under consideration was dependent on lot. Was it dependent upon chance within the meaning of the statute? In a certain sense and in a certain degree, perhaps, any prediction, as to human action, may be said to be dependent upon chance; that is to say, it is in some measure dependent upon circumstances, the happening of which can not be anticipated or foretold with any degree of certainty. * * * A student of Statistics might know approximately the number of Republican votes and the number of Democratic votes in the State of Ohio; he might approximate the ratio, in which one or the other might increase or decrease in a given year. It is quite likely that his estimates would often be wide of the mark, but it would not be by reason of chance but by reason of causes in regard to which he had formed erroneous estimates. It would hardly do to say that a child or a school boy could form as correct an estimate in the matter, as an experienced politician, who had given weeks and months of steady attention to the consideration of the question. But without further elaboration, I am quite clear that estimates, made upon the probable political action of the people, in a given State, in a pending election, can not be said to be dependent upon chance within the meaning of this statute." It was argued by the Attorney-General, in this case, that a prediction, that a man, who has for a long time, maintained certain political opinions, will continue on the same line, is not dependent on chance. He admitted that a man might utterly change his opinions but such change would not be purely a matter of chance.

This opinion can not be supported on reason or authority and its influence on the administration of the Lottery Act has been deleterious in the extreme. The gamblers never failed to cite this opinion in support of their proposed schemes and many times it had to be conceded that, if the principle, announced therein, was applied, many gift enterprises, which were excluded from the mails, should have been admitted. If the fact, that stakes are laid on the issue of an event, be a test of the presence of the chance element in it then the result of an election unquestionably has in it that element for, it is well known, that there is, probably, more money lost and won on the result of elections than any other one thing, unless it be cards and horse races. It is not claimed that the result of an election depends on chance, any more than the future state of the market in regard to stocks or grain depends on chance, but it is insisted that so far as the adventurers are concerned there is chance, because they do not know and can not know, and can not, in advance, by their knowledge and foresight, predict or determine or control the result. But Attorney-General Miller undertook to show that a person of experience and political knowledge would, in such a contest, have an advantage over one of inexperience and ignorance and he thought a child or school boy could not form as correct an estimate in such a matter as an experienced politician, who had given weeks and months of steady attention to the consideration of the question; and yet he said that while a student of Statistics might know approximately the number of Republican and Democratic votes in the State of Ohio and might approximate the ratio in which one or the other might increase or decrease in a given year, it was "quite likely his estimates would often be wide of the mark," and then he adds that this would not be "*by reason of chance but by reason of causes in regard to which he had formed erroneous estimates.*" The statement that a student of Statistics, who had devoted months to the study of the subjects, would quite likely be wide of the mark in his estimate of the votes, that the Republican and Democratic candidates would receive at a given election, concedes the whole

ground, especially, when it is further stated that the failure to make a guess not "wide of the mark" would be by reason of causes in regard to which the guesser had formed erroneous estimates.

Sec. 128. Do not these statements bring the uncertainty here exactly within the definitions of chance heretofore given? If the most experienced man may quite likely be "wide of the mark," because there are many occult causes, in regard to the operation of which he forms erroneous estimates, what would be the status of the masses of the people to whose gambling spirit such a guessing contest directly appeals? It is a fact that the most experienced politician would, in his estimates of the votes of the respective candidates, reach a point where he would be conscious of having entered a field of mere speculation, of mere luck or chance and in selecting a number his mental condition would be the same as in the selection of a number in a lottery or raffle. In either case he would be conscious of groping in the dark and that if he should select a winning number it would be due wholly to chance. He might be influenced in the selection by sentiment or by a whim, such as taking an odd or even number, or by taking what are popularly supposed to be lucky numbers, but at the same time he would feel his knowledge of the subject was of no use to him. These observations apply, of course, with certain limitations. Every intelligent guesser would feel sure of his ground up to a certain point; but what is meant to be asserted here is that he would, in his estimates, finally pass the line between certainty and uncertainty and enter the region of doubt, where choice would rest upon chance and not upon his knowledge, foresight or sagacity.

That the Attorney-General was correct when he said the experienced statistician would quite likely be "wide of the mark" is shown very clearly during every election, when committees of the political parties, after two or three most careful polls of the State or district, give out estimates, which astonish them when the actual count is announced; and two months after the presidential election of 1896 five leading newspapers

in the United States published the vote for president and there was a difference in their figures of over 40,000. If it be difficult, therefore, to accurately and unerringly count 13,000,000 votes, would it be inaccurate to say that a guess, in advance, as to the number of votes certain candidates would receive, depends on chance? And the same rule would apply to an election in a State, district, county or town. Of course the extent of the field of speculation, luck or chance would be in direct proportion to the size and population of the territory in which the election is held, but the guesser in that field, whether large or small, would, in order to win, have to rely on chance and not on his will or judgment or foresight.

Sec. 129. The Attorney-General added that the lottery Act of Congress was passed, as was well known, to suppress the Louisiana Lottery and kindred concerns and he thought an attempt to bring such guessing contests as this within the Act would result in injury rather than good in the administration of the law. He failed to recognize the well known fact that, if you give a gambler an inch, he will take a mile. Yield one point to a gambler and he boldly steps upon it, and using that as a vantage ground, forthwith, presses for the yielding of other points. The postoffice Department followed the ruling of General Miller because he was the ranking law officer of the Department, and in carrying out the principle he announced to its logical results, at the earnest solicitation of the gamblers of the country, admitted to the mails the advertisements of other schemes, which, it was felt all the time, involved all the elements of a lottery, including that of chance. These schemes were guessing as to the number of bales of cotton that would be raised in the United States or the number of bales that would be marketed at a certain city in a given year, or as to the amount of bank clearances in a certain city on a day named, the clearances for two or three weeks previous being given, or as to the number of words that would appear in a certain column of a newspaper in a future issue named, the publisher stating that the same class of matter and the same kind of type would be used in the

paper all the time and defining what would be regarded as words in the count. The schemes in regard to bank clearances and the words in the column of a newspaper failed because they did not prove popular and the other scheme in regard to the production or sale of cotton was not resorted to, to any great extent.

Sec. 130. In 1896 a company offered prizes amounting to \$105,000 to those who would give the correct or nearest correct guess as to the number of votes the candidates for president that year would receive, the capital prize being \$50,000. And soon after the election that year an enterprising party devised an elaborate scheme, by which he offered large prizes to those, who would give the correct guess or nearest correct guess as to the number of votes the candidates for president would receive in 1900 and 1904 but the Post-office Department drew the line at this scheme, holding that it did not come within the principle laid down by the Attorney-General. And again a newspaper offered prizes to those guessing who would be nominated for president and vice-president, in 1896, by the various parties and the Department refused to let this scheme be advertised through the mails, though it was strenuously insisted that the principle of Attorney-General Miller's opinion covered such a case. In fact the gamblers sought to have that opinion cover nearly all the well known gift enterprises of the time and after several years experience with them, the Department finally restricted the operation of the principle of that opinion to the precise case stated in it, that is to a case where the candidates had been nominated and the platforms adopted, and even in such a case it felt there was a lottery. It is to be hoped that the question will be taken to the courts, or again to the Attorney-General, when that pernicious principle can be overthrown, as it will assuredly be, when it is re-examined in the light of the cases that have been decided and in the light of the experience of the Department in the administration of the Lottery Act since 1890.

Every civilized nation on Earth makes wagering on elections, not only illegal, but also, in many cases criminal, as

being against public policy and good morals; and lottery gambling, in the guise of guessing contests on the result of elections in our country, should be condemned in the strongest terms, instead of having the sanction of the Administrative Departments at Washington City.

Sec. 131. An excellent illustration of what is meant by even an expert guesser reaching a field of mere luck and speculation in this class of cases appeared in the daily papers not long since. It was stated that the Assistant Director of the Census estimated that the population of the United States, which will be shown by the census of 1900, will be *about* 75,000,000; the Government Actuary's estimate was 77,676,000 and that of the Superintendent of the Coast Survey was 77,472,000, the latter qualifying his calculation by saying it left a margin of a possible error of 250,000. Here we find a difference in the estimates made by three men, who may very properly be regarded as experts on the subject, of 2,677,000 in one case, 2,472,000 in another and 204,000 in still another, with one of the parties giving a margin of a possible error of 250,000. The party giving this margin no doubt felt that, availing himself of all the statistics and information within his reach, he was still in the field of chance to the extent of 250,000 and the Assistant Director of the census no doubt realized that he had reached the field of chance also, for he estimated the population would be *about* 75,000,000. Can anyone hesitate for a moment to say that a prize offered, by way of wager, to one of these three men, who would guess nearest the population of the Country next year would depend on chance?

Since the above was written Gen. Merriam, Director of the Census, has estimated that the coming census will show a population of about 72,500,000, thus showing a difference in the estimates made by him and that made by the Assistant Director of the Census of 2,500,000 and between his estimate and that made by the Government Actuary of 5,176,000. Where such differences in estimates between experts exists there can be little question that money, payable upon making

a correct estimate or the nearest correct estimate in cases of this class, must necessarily depend on chance.

GUESSING CONTESTS; CONTENTS OF VESSELS AND WEIGHT OF ARTICLES.

Sec. 132. Lottery gambling, in the form of guessing contests as to the contents of vessels and the weight of articles, has prevailed and still prevails very extensively. These contests are gift enterprises, as a rule, that is, they involve the transfer of rights of an independent value, together with the right to participate in a disposition of property by chance, for which a valuable consideration has been given. These contests were and are resorted to by some business men for the purpose of advertising their wares or increasing their sales. Merchants place in their windows or places of business, vessels filled or partially filled with shot, beans, peas, wheat, buttons or something else of a kindred nature, or cakes of soap or other articles, and offer prizes to those who guess the correct or nearest correct number of shot, beans, etc., in the vessels, or the weight of the soap or other articles. Where the guessers are expected to see the vessels, soap or articles, before making estimates of their contents or weight, the size of the vessels or soap or article is not stated, and the competitors must determine for themselves first, what the sizes are, then make their estimates of the contents of the vessels or the weight of the soap or other article. But where the guesses are sent by mail, the operators of the schemes usually give the sizes of the vessels or soap or article, though probably there has been no contest in regard to the weight of an article, where the competitors did not see or were supposed to see the article itself. Usually the vessels are very large and only partially filled with shot, beans, etc., of different sizes, so as to increase the chances of making correct estimates. After experimenting with these contests for some time, the Postoffice Department finally held that the uncertainty of giving a correct estimate, in regard to the contents of the vessels or weight of the articles, amounted to chance, where it plainly

appeared the transactions involved the element of a wager or gambling. As to the beans, peas or grains it became manifest where the offer of a prize was made to the public in a large country like ours and the answers were to be sent by mail, the chance element was present, though the exact inside size of the vessel was given, for these reasons:

First: The varieties of beans, peas, wheat, oats, etc., were numerous and the sizes of these cereals, even of the same kind and variety, depended upon climatic conditions, soil, seasons and cultivation to such an extent it was impossible for a competitor to make anything like a correct guess, even by filling a vessel of the size given, with the articles named and then counting them. And in the second place, it was found by experiment, that a vessel might be filled with the same variety of cereal, raised in the same field, several times and then counted, and the count would vary each time.

Sec. 133. A quart measure was filled, heaping full, with common navy beans and a straight edge passed over it and then by shaking and pressing the beans down and filling up the interstices, to the fullest extent possible, a large number of additional beans was put in, so as to allow the straight edge to pass over the mouth again. And a quart measure was filled, heaping full, with No. 4 (turkey) shot; the straight edge passed over the mouth and by shaking and pressing the shot down, two hundred and fifty additional shot were put in. It was found that the straight edge could be passed over the mouth of the vessel in one direction without disturbing the contents, while it removed several shot or beans if the vessel was turned half around, and was passed over it again; and so again some shot or beans were removed by passing the straight edge over the vessel at other angles. These experiments clearly demonstrated that the word "filled" has no definite and unvarying meaning; and when it is stated a vessel is "filled" with shot or beans, the public can not know how full it is. It all depends upon the extent to which the contents are pressed down and the interstices filled and the direction in which the straight edge is passed over the vessel.

So that it was decided that no unerring estimate could be made in this class of cases, except by counting the identical things named in the advertisement of the contests, and so long as there were even two chances to one against guessing correctly, the scheme was a lottery, just as there would be a lottery, if only two tickets instead of a million were put in the wheel.

If it be so doubtful whether the vessel contains 10,000 or 10,001 that the most experienced person could not by his judgment determine which was the correct number, the chance element, pure and simple, would be present and the chance in that case would be of the same character as that which would inhere in a contest where the uncertain numbers amounted to hundreds or thousands, instead of two. The probabilities of guessing the correct number, in one case, would be greater than in the other but the chance, in its relation to gambling schemes, would be the same in both.

But as the successive counts of the contents of the same vessels filled from the same lot of shot, beans, etc., showed a difference of considerably more than two, the Department felt doubly sure of its ground, especially when the operators persisted in advertising these schemes and the people with equal persistence continued to stake their money on the result of their guessing. Both promoters and adventurers have discovered, after many years of trial and experiment, that these guessing contests involve chance and that they open as wide a field for gambling, as do horse races, cards or regular lotteries.

Sec. 134. Hudelson, in *Hudelson, vs. State*, 94 Ind. 426 (48 Am. Rep. 171), was indicted for a violation of a Statute of Indiana, which prohibited the advertisement "of any lottery, gift concert or scheme of chance of any kind or description by whatever name, style or title the same may be denominated or known." In the scheme, he advertised, he offered a gold watch to the purchaser of fifty cents worth, or more, of goods from his stock, who guessed nearest to the number of beans contained in a glass globe on exhibition in his window, stating when the contest would begin and end. Hudel-

son contended that the enterprise was not a lottery nor in the nature of a lottery or gift enterprise, on the ground, that to arrive at the correct number of beans in the glass globe was not a matter of chance but of a mathematical calculation. The court overruled this contention and held, that while an expert mathematician might compute the dimensions of the glass globe with a reasonable degree of certainty, yet the result could be but approximately correct. The exact thickness of the glass would have to be known and that could not be known simply by an observation of the sealed globe, and therefore, that would be an element of guessing. The court continued: "And if the exact size of the globe were known, it would be utterly impossible by the application of mathematical rules, or by any other means, to calculate the number of beans contained in it. The size of the several beans, so far as they could be observed, would be a matter of pure guessing. And besides only those on the surface and next to the glass could be seen. Those in the center might be smaller or larger. In short, there could be no fixed or definite fact or quantity upon which to base a mathematical calculation or demonstration. The number of beans in the globe could be nothing else than a matter of guessing. An expert mathematician might more nearly fix the size of the globe than an entirely uneducated person. And so he, and persons of better judgment, might more nearly fix the number of beans in the globe than persons of less judgment; yet the exact number would be a mere matter of guessing. That anyone should guess the correct number would be a matter of the merest chance, because there are no means of attaining to a certainty."

There is no other American case, known to the writer, where the question in regard to this class of cases has been before the courts; but the question has been judicially determined in two cases in the province of Ontario and one in New Brunswick.

Sec. 135. In *Regina vs. Dodds*, 4 Ont. Rep. 390, the defendant, being the proprietor of a newspaper, advertised in

it that whoever should guess the number nearest to the number of beans which had been placed in a sealed glass jar in a window on a public street should receive a \$20 gold piece, the person making the next nearest guess a set of harness, and the person making the third nearest guess a \$5 gold piece, any person, desiring to bid, to buy a copy of the paper and to write his name and the supposed number of beans on a coupon to be cut out of the paper.

The defendant was convicted by the Police Magistrate of the City of Toronto of being guilty of a contravention of the Lottery Act. The case was taken up on *certiorari* and the Queen's Bench Division of the High Court quashed the conviction, and held that as the approximation of the number depended as much upon the exercise of skill and judgment as upon chance this was not "a mode of chance" for the disposal of property within the meaning of the Act.

In this case, the court said: "The articles (the beans) were exhibited visibly in a glass jar to all parties, and each person was to exercise his judgment as to the number. * * * It was a chance, no doubt, in a sense that it would be difficult to most minds to make a really near approximation to the truth, but others might, from training or turn of mind, or from accuracy of observation and facility of mental arithmetic, applied to the visible size and capacity of the vessel, make a more or less accurate estimate of the contents. A trained eye could fairly approximate the cubic contents of a mass of rock or earth to be excavated in an engineering operation. The untrained would probably have to rest on the most baseless guess work or chance in fact." And the Chief Justice was disposed to think the result did not depend on chance. An associate judge held it depended on chance, and another judge concurred generally.

Sec. 136. In *Regina vs. Jameson*, 7 Ont. Reps. 149, it was shown that the defendant, who was a tailor, placed in his shop window a globular glass jar, securely sealed, containing a number of buttons of different sizes. He offered to the person who should guess the number nearest to the number

of buttons in the jar a pony and cart, stipulating that the successful one should buy a certain amount of his goods.

This enterprising tailor was also convicted by the Police Magistrate of Toronto, but upon *certiorari*, the conviction was quashed, and it was held that as the approximation of the number of buttons depended upon the exercise of judgment, observation and mental effort, this was not a "mode of chance" for the disposal of property within the meaning of the Act.

In this case, the court, the Queen's Bench Division, said: "The fallacy of the argument of the Crown seems to me to be that because the estimate may not be exact, it is therefore no estimate, but a mere chance method. The number to be ascertained is a certain definite and ascertainable fact. Nothing can remove it to the region of uncertainty. The opening of the jar and counting of the buttons will ascertain the fact. If a mistake is made in counting, the fact would still remain, and no one would say that a person, who, from habits of mental carelessness, frequently made mistakes in the counting, was ascertaining the number by a method of chance. The jar being closed, the fact that the buttons were of unequal sizes and different shapes renders the estimate less accurate and more difficult; nevertheless, it is an estimate, a calculation, an endeavor to ascertain the fact by mental process rendered more or less certain by a variety of circumstances."

The court, disapproving of the principle laid down in *Hudelson vs. State*, 94 Ind. 426, added:

"When the learned judge Zallors admits, that an expert mathematician might more nearly fix the size of the globe than an entirely uneducated person, and that he and persons of better judgment might more nearly fix the number of beans in the globe than persons of less judgment, it seems to me, with great deference, he concedes the case and removes the question from the region of chance to that of calculation."

A majority of the court, having gone wrong in the first case, persisted in its error in this case and went still farther and asserted a doctrine that would eliminate the chance element from all transactions. The court says the number to be

ascertained was a certain, definite and ascertained fact, and evidently regarded the chance, if any, as inhering in the event itself (that is the number of buttons in the jar) and not in the state of the knowledge of the guessers. Of course the number of buttons in the jar was definite and certain but the guessers did not know and could not know, in advance, what that number was.

Suppose that, after a drawing of the Louisiana Lottery, a prize should be offered to the person, who should guess the lucky number, would anyone contend that there was no chance in such a guess, simply because the lucky number had been drawn, was made certain and definite and was known to the promoters of the lottery? The court says, however, that an endeavor to ascertain the number of buttons in the jar, by mental process, "was rendered more or less certain by a variety of circumstances." Here it is conceded that the most intelligent guesser is in a region of doubt to a certain extent and that being the case his success must necessarily have depended upon mere luck or chance. It seems that the buttons, being of different sizes and shapes, made it utterly impossible for any one, by mental effort, to state exactly or proximately the number. But the view of the writer on contests of this kind fully appears in what is said above and in the comments on the opinion of Attorney-General Miller and on the case of *Dunham vs. The St. Croix Soap Manufacturing Company*, and what is said there need not be repeated here.

In this case it may be noted that, while the fact does not appear in the report of the case, the guesses ran from 200 to 50,000, showing that the exercise of judgment, observation and mental effort in different persons produced very different results.

Sec. 137. In *Dunham vs. St. Croix Mfg. Company*, 34 Reports of the Supreme Court of New Brunswick, 245, the defendant company offered a piano, worth \$800 to "the correct or nearest correct guesser" as to the weight of a cake of Surprise soap. No charge was made for guessing but the ticket that the guesser received stated: "Keep this. You guess

free of charge. You have this chance for a free guess, because we want you to think about Surprise soap, to talk about it, to know it, to use it. * * * All we ask in return for the privilege of guessing is that you give Surprise soap a fair trial as a laundry soap." The ticket also stated that each person could guess once only each day and that in case two or more guessed the same weight the judges had "the right to decide the winner by lot in such manner as may appear to them to be the fairest to all concerned." The plaintiff's guess was 483 pounds and 10 ounces, which she claimed was the nearest to the correct weight of the cake of soap, but for some reason not disclosed by the record the defendant company did not deliver the piano to her and she brought suit claiming \$800. The company demurred to the petition and for grounds of demurrer set up a want of consideration, and that the contract was illegal, as it involved the carrying on of a lottery. Mr. Justice Barker of the Supreme Court of New Brunswick held there was a consideration for the contract and that the scheme was not a lottery. As to the consideration, Mr. Justice Barker, after stating that he expressed no opinion as to whether a guesser was required to give the soap a trial or not, said:

"Apart from this, we think, in all such cases as this, where a person by public advertisement agrees, on the performance of any defined act or consideration, to pay a specific sum of money, he becomes bound, on notice by any one who in fact does the act or performs the condition, provided the act or consideration is not illegal. So in this case, if the defendants—no doubt having in view the publicity it would give their soap and the increased sale of it—choose to offer and agree to deliver a piano to any one person who, subject to conditions which they impose, shall guess or come nearest to guessing the precise weight of a block of their soap on public exhibition, they are bound to do so to any one who does so guess."

As to the lottery feature of the scheme the learned Justice said:

"It is not a case of purchasing tickets, where it is simply a matter of chance, which ticket wins. The person who

guesses pays nothing for the chance of competing, and has nothing at risk. On the contrary, while as in all such cases the element of chance is not wanting; skill and judgment in a competition like this will almost inevitably win as against inexperience. The man with a knowledge of the weight of soap and a capacity for judging by the eye of the size of the block, and the knowledge from such data to judge of its weight will be much more likely to win in such a competition than one who has no such knowledge or capacity to aid him. *Reg. v. Dodds* (4 Ont. R. 390); *Reg. v. Jamieson* (7 Ont. R. 149)."

It is manifest the learned Justice simply followed the cases of *Reg. vs. Dodds*, and *Reg. vs. Jamieson*. He thought there was enough consideration moving from the plaintiff to support the contract, but the consideration necessary to make the scheme a lottery was wanting. He argued that the plaintiff paid nothing and risked nothing. If she paid nothing and risked nothing, upon what ground, other than that of a wager, could she recover \$800 from the defendant company? The fact is she did not earn that sum or anything like it, but the company offered an \$800 piano as the prize upon the ground that all of the competitors earn that much by way of advertising Surprise soap. That the company's motives were mercenary is apparent from the very terms of the offer and the company evidently thought that there would be more than one competitor and that the benefits, accruing to the company from the offer and award of the prize, would be full compensation for it. It was just as much trouble and inconvenience for the competitors to guess wrong as right and the advantages accruing to the company were as great in one case as in the other. Hence all the competitors earned the prize and upon what ground, other than that of a wager, could the company deliver to one of them a prize earned by all?

The learned Justice thought that the element of chance was wanting in the scheme, because "skill and judgment in a competition like this will almost inevitably win as against inexperience" and that a man with a knowledge of the weight of soap and the capacity of judging by the eye of the size of a

block will be much more likely to win in such a competition than one who has no such knowledge or capacity to aid him. The Justice did not say that a person of experience would certainly win, but he simply said that he would more likely win than an inexperienced person. This virtually concedes that no one could unerringly state the exact weight of the soap and not being able to do that, no one could know whether he had won the prize, until after the soap had been weighed. Every one entering the contest would no doubt feel sure of his ground up to a certain weight, but every one, no matter what his knowledge and experience may be, would finally reach a point in his estimation of the weight of the cake of soap, where he would be conscious of having reached the field of speculation and of mere guessing; that is to say, he would find certain figures between which he would be unable to decide which to choose and the figure finally taken would be more the result of a whim or sentiment rather than of judgment. The plaintiff in this case says she guessed the weight of the cake of soap to be 483 pounds and 10 ounces, but there is no question that if she had been asked why she took 10 ounces rather than 9 or 11 or any other number of ounces or why she took 483 pounds, rather than 482 or 484, she would not have been able to give an intelligent reason for it. Besides that she had the right to guess once every day for ten days and no doubt the ten guesses she made were different. The defendant company recognized the inability of any one to state the correct weight of the soap, except by chance, in giving all competitors the right to make ten guesses and thus it recognized at least ten chances to one against a correct guess.

The position assumed by the Justice seems to be that only one experienced person would enter the contest and all the other competitors would be inexperienced in regard to the weight of the soap. The terms of the contest were not so limited and the probability is that all who entered the contest were experienced on this line or had the advice of friends and relatives who were experienced. But if two or more ex-

perienced persons entered the contest the scheme as to them was a lottery, unless both could unerringly state the exact weight of the soap, in which case the plan provided that the prize should be awarded to one of them by lot, which of course in that event, made it a lottery and as between the inexperienced competitors there was chance. This scheme which was a gift enterprise undoubtedly appealed to the gambling spirit and held out the hope to the public of getting something for nothing or almost nothing.

Sec. 137a. The Department has held that a prize offered to the party who would guess the number or nearest the number of seeds in a watermelon or pumpkin depended on chance. In such a case there are absolutely no data upon which even an experienced person can rely for success.

HORSE RACES AS THE BASIS FOR LOTTERY SCHEMES.

Sec. 138. In *Allport vs. Nutt*, 1 C. B. 974, plaintiff sued for £100, having subscribed £1 to an adventure on the terms that in a certain horse race, the names of the horses should be put on separate cards and be mixed in a box and the names of the subscribers should also be written on separate cards and mixed in another box. One card was drawn out of the horse box and then one out of the other. The person whose name was drawn out after the horse, which should afterwards win the race, should have £100. The defendant contended that the transaction amounted to a lottery, or in the alternative to a wager under the Statute of Anne and for that reason the plaintiff could not recover. On behalf of plaintiff it was argued that a lottery to be determined by a legal horse race was not prohibited and the transaction in question was nothing more than betting on a legal horse race. The court held that the transaction was a lottery, and that the words "all other lotteries" used in the statutes were broad enough to take in the case, thus embracing what are commonly known as sweepstakes.

Sec. 139. This case was followed in *Gatty vs. Field*, 9 Q.B. 431, where the same methods were adopted to determine the

winner of the prize. The courts do not indicate where in these schemes the chance element was found; but in view of other English cases it may be inferred that the decisions were based on the theory that chance inhered in the selection of the horses and not in the outcome of the races, and yet if that theory had been presented to the competitors, no doubt they would have rejected it, as not being in their contemplation, at the time they deposited their money. If there was no chance in the outcome of the races, then the contest could have been and ought to have been determined, as soon as the drawing of the horses was concluded, for in that event each competitor should have known which horse would win, before the race came off. The fact, however, no doubt, was that the competitors could not have agreed before the races came off, who should have the prize, and if an attempt had been made to hand the prize over to one of the parties on the ground that the outcome of the races, depending alone on the speed of the horses and not on chance, could be as unerringly determined before the races were run, as afterwards, there would have been a vigorous and effective remonstrance against such a course. The competitors undoubtedly staked their money on the outcome of the races, and not on the selection of the horses. The fact that they left the selection of their respective horses to chance indicates very clearly and unmistakably that there was no choice among the horses, so far as the foresight and judgment of the competitors could determine, and hence, they were willing to stake and did stake their money on the horses that the lot awarded to them respectively and they made the prize dependent on the chance which they recognized as inhering in the outcome of the races alone. The outcome of the races did not depend on chance, for there is no chance anywhere in the universe but to the competitors, in their then state of ignorance as to "the emergence of the event," there was in fact chance and when they staked their money they in common parlance "took their chances" to receive a prize, to be awarded to the person, whose name should be drawn out after the horse that *should win the race.*

In *Tollett vs. Thomas*, L. R. 6 Q. B. 514, the Queen's Bench propounded but did not answer the question whether the outcome of a horse race depends on chance or not but disposed of the case on another ground. In *Caminada vs. Hulton*, 60 L. J. M. C. O. N. S. 116, and *Stoddard vs. Segar*, 2 Q. B. 474, the courts held that horse races did not depend on chance. In both cases the courts laid stress on the fact that the competitors had the right to choose the horses on which they staked their money. In *Stoddard vs. Segar*, the court held that there was no chance in the scheme though the winner was required to name four of the fastest horses. But if a party can unerringly name one, he could with equal certainty name four or state the order in which all the horses would come in. And if one bettor can name the winning horse, why can not all the bettors, of *equal intelligence* name the winner? It is a well known fact that professional gamblers habitually bet on different horses. If staking money on an event is a test whether a gambling chance inheres in that event or not, then a horse race has the element of chance in it, because probably more money is lost and won on horse races during the racing season by the gambling fraternity and the public too, than, with few exceptions, on anything else. It is too well known that it is the chance element in the racing of horses that makes the race course such an attractive place for those who gamble, and if they could unerringly name the winning horses, betting on horse races would be as senseless as "betting on the rising of the sun, or the succession of the seasons." The chance element in these cases relates solely to the ignorance of the competitors as to the outcome, and they invest their money on account of this ignorance and nothing else. This is the doctrine laid down in the *Lovell* case, 39 N. J. L. 458, and it is unquestionably the correct doctrine. The court there said the physical condition of the horses and their riders, the fastenings of their shoes, the honesty of purpose, that actuates the riders and their owners in running them, are all matters about which the judgment of the outside bettor can avail him no more, than

the arithmetical calculation of chances can avail the dice thrower.

Sec. 140. In *Caminada vs. Hulton*, 60 L. J. (M. C.) N. S. 116 (1891), the proprietor of a sporting newspaper offered a prize to the party, who would name six, five or four winning horses in a given race. It was held that this was neither a bet nor a lottery.

Day, J., said: "I am clearly of the opinion that this can in no possible sense be deemed a lottery within the meaning of the Lottery Act. There is no contrivance or device to obtain money, by chance, or by anything analogous to chance, and in my judgment what is done here nowhere approaches the description of a lottery. It is far removed from the scope of the Lottery Act and I can not see the possibility of any reasonable argument being presented to show that this was a lottery or within the mischief of the Lottery Act. The other ground, namely, that it was betting, is more suggestive. It might be said, although established with difficulty, that this was a bet on the ground that a person has paid a penny by way of backing six horses to win six particular races; but when one comes to consider more carefully what the nature of the transaction is, even that absurd notion of a bet would not be applicable. Clearly it is not a bet at all.

Any person who gets hold of one of these pieces of paper becomes entitled to get a prize of a large sum of money in the event of his succeeding in guessing the names of the winners of the six particular races; it is really not a bet; it is a scheme—a device—for the purpose no doubt of furthering the business, which the respondent carries on, enabling him to sell this handicap book or Racing Record, with which these tickets or coupons are issued."

Sec. 141. In *Stoddard vs. Segar*, 2 Q. B. Law Reps. 474, the defendants published a newspaper and offered a prize of £100 to the purchaser of the paper who would name 1, 2, 3 and 4 winning horses in a horse race. They were prosecuted for a violation of the Lottery Acts, and Betting Acts of 1853, prohibiting the opening and using of an office for the purpose

of receiving money as the consideration for an undertaking to pay money on events or contingencies relating to horse races or receiving moneys or deposits on bets on condition of paying £100 on the happening of events and contingencies relating to horse races; and also for violating the Betting Act of 1874, forbidding the advertisement of bets and wagers on horse races. Wight, J., and Pollock, B., held that this scheme was neither a lottery nor betting, following *Caminada vs. Hulton*, 60 L. J. 9 (M. C.) 116.

The difference between this case and *Caminada vs. Hulton*, is that in the former the competitor was required to name four winning horses in the order in which they would pass the poles, while in the latter he was required to name six, five or four winning horses without giving the order of their fleetness. The chance of winning was the same in each case but the probabilities of winning were different.

The number of horses entered for the races in these cases is not given but suppose for illustration that twelve were entered in each, and suppose the horses were so equally matched that men of ordinary intelligence and with equal knowledge in respect of the races would select different ones; then in the case of *Caminada vs. Hulton*, the odds against the competitor naming six winning horses would be 924 to 1; against his naming five would be 792 to 1, and against his naming four would be 495 to 1. On the other hand, in the case of *Stoddard vs. Segar* the odds against the competitor naming four winning horses in the order in which they would win would be 11,880 to 1. These results are reached by the rules given in *Chambers and Brittanica Encyclopaedias* under the title "Probability." In the case of *Caminada vs. Hulton* the chances or probabilities of naming six winning horses out of twelve, without regard to the order in which they would win, would be $\frac{1}{12} \times \frac{1}{11} \times \frac{1}{10} \times \frac{1}{9} \times \frac{1}{8} \times \frac{1}{7}$ or $\frac{1}{665280}$ or $\frac{1}{84}$ or 1 chance in 924; the chances of naming five winning horses would be $\frac{1}{12} \times \frac{1}{11} \times \frac{1}{10} \times \frac{1}{9} \times \frac{1}{8}$ or $\frac{1}{59400}$ or $\frac{1}{792}$ or 1 chance in 792; and the chances of naming four horses would be $\frac{1}{12} \times \frac{1}{11} \times \frac{1}{10} \times \frac{1}{9}$ or $\frac{1}{11880}$ or $\frac{1}{495}$ or 1 chance in 495.

In naming the six horses out of twelve the competitor would have six chances out of twelve of naming the first horse, five chances out of eleven of naming the second, and so on for the others. In the case of *Stoddard vs. Segar*, the competitor would have one chance in twelve to name the first horse in the order it would win, one chance in eleven to name the second horse in its order, one chance in ten to name the third and one chance in nine to name the fourth or one chance in 11,880 to name all four in their order.

Sec. 142. In *People vs. Reilly*, 50 Mich. 384, the defendant was found guilty by the trial court of selling pools on horse races and selling checks on baseball matches, where those, who bet on the winning combinations, received the pool. The defendant had nothing to do with the races or matches. The Court held that he was not guilty of conducting a lottery basing its conclusion on the Statute of Michigan, making a distinction between betting and lottery. The Court said, however, that the defendant was guilty of a species of gambling. The Court also seemed to think that in a lottery a large sum of money must be involved and a great number of people engaged. There is no discussion of the difference between ordinary gambling and a lottery.

The Constitution of Michigan of 1835 prohibited lotteries entirely, and in 1867 (1 Sess. Laws 1867, p. 122), the statute in regard to lotteries was amended by inserting after the word "lotteries" the words "gift enterprises." The Court said: "This change was no doubt introduced from a doubt whether gift enterprises, which were then becoming numerous, belonged strictly to the class of lotteries because, in some respects, conducted in different ways although reaching similar results.

Sec. 143. In *re Dwyer*, 35 N. Y. S. 884, it was held by Gaynor, Judge, that a horse race, the winner of which was to receive a certain stake, to be made up from entrance fees paid by the owners of the contesting horses and an additional sum to be added by the manager of the race, if the entrance fees were not sufficient, was not a lottery. Dwyer was the presi-

dent of the Brooklyn Jockey Club, an association formed under the laws of the State of New York for the incorporation of associations for improving the breed of horses. Acting for the association Dwyer advertised a horse race to be run on the association's grounds in Brooklyn on May 15, 1894. The race was open to all thoroughbred horses, three years old and upwards, but in order to run, horses had to be entered on the books of the association and an entry fee of \$250 was charged, part of which was refunded, in case the horse was withdrawn before the race. The race was to be for a stake of \$25,000, of which \$18,000 was to be given to the winner, \$5,000 to the second horse and \$2,000 to the third. Judge Gaynor said this was not a lottery, either in common speech or within legal definition; that "a lottery depends on lot or chance, such as casting of lots, throwing of dice or turning of a wheel." It was argued that in that case horse owners did not pay a sum of money to win a larger sum by lot or chance but in order to enter into the contest of skill, endurance and speed, upon which the stake depended. The judge then goes on to show that, from the earliest times in New York there had existed two distinct lines of legislation on two distinct subjects, one being raffles and lotteries and the other betting and gaming, and that the statutes in the one system did not create and cover offenses in the other and horse racing was covered by the statutes against betting and gaming and not by the lottery statutes. By the laws of New York the operation of the statute against "all racing or trial of speed between horses or other animals for any bet, stake or reward," was suspended during 30 days in each year on the grounds of the association, of which Dwyer was president, and all like associations and the day of the race in question was one of those days. The Court made no effort to place the decision on the ground that the transaction was not gambling but placed it upon the ground that the prize offered was simply intended by the association to encourage the raising of the best breed of horses. The only intimation of such a proposition we get from the opinion is the opening statement that "the two recent decisions in civil

cases cited on the argument scarcely apply." The two cases referred to must have been *Irving vs. Britton*, 28 N. Y. S. 529, and *Luddington vs. Dudley*, 30 N. Y. S. 221. In the first of these cases the contest was in regard to a note given by defendant, partly for an interest in a pool and partly for a bet with the book-maker at a horse race. The scheme was that the total amount invested on the different horses, less the commission of the person conducting the pool, was divided in equal sums and was paid to the persons having selected cards, tickets or receipts on the winning horse; and it was distinctly held that the process of the pool was "in every essential a lottery." Judge Pryor said it was a scheme for the distribution of property by chance and that the event of a race is a contingency dependent upon chance is a self-evident proposition, citing 1 *Edmonds St. at Large*, 614, S. 8. He thought that if the result of a horse race was susceptible of infallible anticipation, betting thereon would be as senseless and futile as upon the rising of the sun or the succession of the seasons, and that it was the element of chance and the uncertainty of the event alone that stimulated and supported the wagers of the competing bettors. The judge cites among other cases *State vs. Lovell*, 39 N. J. L. 458, and *Tollett vs. Thomas*, L. R. 6 Q. B. 514. The Court said nothing about the chance element inhering in the scheme on the ground that the amount the winners received depended on chance. In *Luddington vs. Dudley*, *supra*, the Court simply followed the principles laid down in *Irving vs. Britton*.

Sec. 144. In *Reiley vs. Gray*, 28 N. Y. S. 811, the Supreme Court of New York, at General Term, held that pool selling on horse races was not a lottery within the meaning of the New York Statutes but that the same constituted betting as contradistinguished from lottery gambling but this distinction was made in view of the legislation of that State on the subjects of lotteries and ordinary gaming. Judge Merwin, delivering the opinion of the court, speaking of the difference between lottery and ordinary gambling, said: "They are distinct subjects on the statute books and in the public mind and

if the design had been to cover both, they would have been named. It is not enough to say that they both involve, to some extent, the same kind of evil. It may be difficult to precisely define the difference between the two. It may be said, as in *People vs. Elliott*, 74 Mich. 264, that in betting there is an opportunity for the exercise of reason and judgment while in a lottery there is no such opportunity. It may be said that betting is not a distribution of property, but an agreement to pay the winner certain sums in a certain contingency or that the winner shall have certain sums which are deposited as stakes. But the distinction whatever it may be, it is very clear from the state of the statutory law in 1846 as well as in 1821, that betting upon a horse race was not then understood to be a lottery. That being so, we must hold that it was not meant to be included in the term lottery as used in the constitution. The same rule must apply to the pool selling complained of, as it must be classed with betting, and is a development—a combination—in the same line.”

Sec. 145. In *People ex rel. Lawrence vs. Fallon*, 152 N. Y. 12, it appeared that the relator was an officer of the Westchester Racing Association, which was organized under chapter 570 of the Laws of 1895 of New York. He, together with other officers of the association, announced and advertised the intention to hold a meeting for races on its grounds and offered prizes or premiums to be competed for at a time named. Owners of horses were permitted to enter them for the races, by paying an entrance fee, which became the property of the association, was paid into its treasury and became a part of its general assets. The premiums or stakes offered by the association, were for a definite sum without regard to the amount of the entrance fees received and were payable out of its general funds. The Court of Appeals of New York held that this was not a lottery, chiefly on the ground that the constitution and laws of New York had always made a distinction between racing horses for prizes and lotteries, but also apparently on the ground that the word “lottery” in that state did not include “a test of speed or endurance of

horses for prizes or premiums." The Court held also that the transaction was not gambling, saying: "There is a plain and obvious distinction between a race for a prize or premium, contributed in that manner and a race where the stake is contributed by participants alone, and the successful contestant is to have the fund thus created. The latter is a race for a mere bet or wager, while the former is for a prize offered by one not a party to the contest," citing *Harris vs. White*, 81 N. Y. 532.

Sec. 146. So likewise the Postoffice Department has held that a prize offered to the party who would give the order in which the baseball teams would stand at the end of the season was a lottery scheme, and so also was a prize to be given to the party who would name the champion, the number of seconds of each round, the number of rounds and the number of the round with the number of the seconds in the round which would terminate the prize fight between Fitzsimmons and Corbett.

That prize fight proves very clearly that there is chance in such contests and that reason has nothing to do with or at least has not a controlling influence over the result for the odds among the gambling fraternity were laid on Corbett and yet Fitzsimmons was an easy winner.

None of these, however, is ordinarily made the basis of lottery gambling simply because the chances are not numerous enough to justify it. A prize offered to the party naming the fastest horse in a race where the horses entered do not exceed probably a half dozen or a prize to the party naming the winning baseball team out of a possible ten or fifteen or a prize to the party naming the successful candidate for president out of two or three would be too hazardous for anyone, as too many would win the prize to make it profitable to the promoter. Hence the promoters adopt methods that shift the risks from themselves to the adventurers. They do this by inviting the adventurers to contribute to a pool which is to be divided equally among those who comply with the conditions. Thus we find promoters advertising pools upon horse races,

baseball matches, prize fights, chess contests, and guessing contests.

BOND INVESTMENT COMPANIES.

Sec. 147. The course of the decisions in the United States and the rulings of the Departments at Washington in regard to Bond Investment Companies, so-called, with the exception of *Union Investment Ass'n vs. Lutz*, which will be noticed hereafter, has been constant and uniform, that the schemes they operate constitute lotteries or similar enterprises.

The history of the rise and progress of these companies in this country forms one of the most humiliating as well as surprising chapters in our annals. They made their appearance, first, about ten years ago in Massachusetts and New Hampshire, where three hundred companies of this class were put in operation. These companies, which were known by the name of endowment orders, issued bonds, payable absolutely at the end of a fixed period, but the plan of business provided that the bonds would be redeemed in *numerical order* from time to time, so far as the funds would extend, but they did not contain the multiple principle of redemption, which became such a prominent feature in their later development. The Insurance Commissioner of Massachusetts denounced these schemes in his report in 1891 and the legislature of that State in that year passed a law declaring that the "issuing of bonds, certificates, or obligations to be redeemed in *numerical order* of precedence or in an *arbitrary manner*, without reference to the amount previously paid thereon by the holder, is hereby prohibited." (Acts 1891, p. 231). In his report in 1893 the Insurance Commissioner said: "During their brief existence the fifty-six Massachusetts corporations of this class gathered a membership of 364,000, and collected from the certificate holders over \$12,500,000. From this sum less than 9 per cent of the membership received in payment of the earlier matured certificates over \$3,000,000, while above \$2,000,000 was paid in claims for sickness, a large proportion of this to certificate holders in excess of their contributions,

and with the natural result of the immediate disappearance of these enriched members from the rolls at the cost of those remaining. Nearly \$4,000,000—one-half undeniably if not undisguisedly a steal—went into the pockets of the promoters and officers as ‘expenses,’ leaving at the end only about \$3,500,000 for distribution to the remnant of 330,000 members, only a trifle more than was gobbled by the 30,000 who got in “on the ground floor,” which list, of course, included all of the ‘supremes,’ their ‘sisters, cousins, and aunts.’ The total amount of the obligations upon the certificates issued by these corporations in exemplifying their wonderful ‘new system of finance’ for the benefit of the poor people, and toward meeting which a paltry \$8,800,000 was altogether collected, was nearly \$120,000,000. It is doubtful if the world’s history, whether in the South Sea bubble, the Dutch Tulip Mania, or the Mississippi scheme, presents a parallel to the ghost dance in which the people were led by this wild and foundationless gambling infatuation.”

The Insurance Commissioner of New Hampshire, in his report in 1891, said: “Here is one of the secrets of the craze to enter the endowment orders—the hope of realizing the sum stated, for the amount invested. Inducements of this kind were, as a rule, the most potent arguments, for, among the unthinking, the prospect of receiving, in a year, the sum of \$100 in return for \$30, \$40 or \$50, or \$1,000 in ten years from an investment of \$268, was too tempting a bait to pass by unheeded, especially when men of prominence were found on the official roster. * * *

Now, if there is anything in this world, except death, more uncertain than the terms of the contract between the various orders lately at work in New Hampshire and their certificate holders, it has yet to be discovered.

The element of chance, in one form or another, enters into all of them. The assets of each order are the promises of the certificate holders, and these promises are, as a rule, worth just the paper they are written upon and payable when the member thinks it is for his or her interest. Tempting

offers are made to all to enter by the front door, and once their admission fees are paid, and several assessments collected, no objection is made to their departure by the back door, for this is part of the programme—the lapse chance of the order—another of the ‘uncertain events’ whose frequent occurrence, at stated intervals, brings joy to the persisting members. An increase of new members brings cash to the pockets of the organizers, and a decrease in the number of the old ones leaves money for the certificate holders. With a knowledge of these schemes, derived from a patient study of their by-laws and statements, words are inadequate to express the indignation which any honest man must feel at the heartless character of the whole business, and the demoralizing effect on those who have been induced by delusive promises to join it.”

In 1891 the New Hampshire legislature was induced to pass a law, known as the “Barber Law,” putting all these concerns under the supervision of the Insurance Department, which refused to grant them the privilege of doing business in that State and in one year thereafter they were all out of business. In 1892 the Commissioner used this emphatic language in his report. “A more scandalous chapter in New England history has never been written, for from the beginning to the end it is a story of deception, corruption, and fraud—a record that cries to heaven for vengeance, for it was a downright robbery of a class that is the hardest worked and the poorest paid in any community, the working men and women. The amount taken from this source in New Hampshire will never be known. A mixed feeling of shame and pride prevents those who have been duped from disclosing their loss, but an opinion of the amount can be formed from the figures given by the insurance commissioner of Massachusetts of the sums collected in that State.”

Sec. 148. These schemes, being suppressed in the land of their birth, sprang up in other sections of the Country and from 1892 to 1896 became a craze and hundreds of companies remorselessly fleeced the people. The plans of operation were varied and ingenious. The monthly contributions

ranged from ten cents to five dollars and the bonds, certificates or coupons, were redeemed in numerical order or by the multiple or numerical system and in some instances by other methods, which will appear later on; and the profits, paid to the holders of lucky numbers, ranged from interest, on the amount invested, at the rate of ten per cent per annum, to over three thousand per cent, not per year but absolutely, or more than thirty dollars for one. These schemes were brought to the attention of the Postoffice Department at Washington in the early part of 1893 and, upon examination, they were held to be lotteries or similar enterprises "offering prizes dependent upon lot or chance," and their promoters were denied the use of the money order and register systems of the postal establishment, the law, at that time, not authorizing an interference with their ordinary mail matter under seal.

Sec. 149. These schemes opened such a rich field for money making that some of the shrewdest and most expert business men and actuaries, and some of the most talented lawyers in our Country became promoters of them, and they were pushed with all the energy and adroitness that brains, education and experience could supply. Their promoters were consistent and persistent in season and out, before the courts and the Departments at Washington, for three or four years, in their claim that the prize and chance elements of a lottery could not be found in these schemes; but the Postoffice Department was as equally consistent and persistent in ruling that the plans of business of the companies, operating the schemes, had all the essential elements of a lottery in them, and in denying their promoters the use of the mails, so far as the payment of money orders and the registration of letters were concerned, until the passage of the Act of March 2, 1895, after which they were denied the use of the mails altogether.

Sec. 150. In the early part of 1894 the president of the Provident Bond and Investment Company, being dissatisfied with the ruling of the Department with regard to the scheme operated by the company, induced the Postmaster-General to submit the question for an opinion to General Olney, then the

Attorney-General of the United States. The company issued bonds to its patrons in numerical order, and redeemed them in the order of 1, 6, 11, 16, 21, 26, etc., using the numeral 5 to determine the order of maturity, and paying 100 per cent profit on the investment during the first year and increasing the profits each succeeding year and on March 19, 1894, General Olney, in an opinion given that day, 20 Opp. Att'y Gen. 748, sustained the Postoffice Department in every detail.

On April 4, 1894, the Attorney-General (General Olney) in an opinion given that day (21 Op. Att'y Gen. 4), held the scheme operated by the Tontine Savings Association of Minneapolis, Minnesota, to be a lottery. The plan of business of this Association is given hereafter. (Sec. 153.)

Sec. 151. In the Fall of 1895 the Pettis County Bond and Investment Company of Sedalia, Mo., The Tontine Savings Association of Minneapolis, Minnesota, The Columbia Investment Company of Cincinnati, Ohio, The National Investment Company of Cincinnati, Ohio, The National Investment Company of Washington D. C. and the Southern Mutual Investment Company of Lexington, Kentucky, applied to Postmaster-General Wilson to revoke the "fraud orders," theretofore issued against them respectively.

The Pettis County Company issued bonds to its patrons, in numerical order, for \$1,000 each, payable on or before twenty years from date, each bond having attached to it four coupons, which were numbered from one, up. Each member was required to pay an initiation fee of \$10 and monthly dues of \$3. Nine dollars of the initiation fee and eight and one-third per cent of the monthly dues were set apart as an expense fund, one dollar of the initiation fee and fifty per cent of the monthly dues constituted a reserve fund, which was to be put at interest, and forty-one and two-thirds per cent of the dues went into a so-called trust fund for the redemption of bonds monthly. The order of redemption of the coupons was 1, 4, 2, 8, 3, 12, 16, 5, 20, and so on until the multiple, 5, extended beyond the number of coupons sold and then the coupons were redeemed in numerical order until, by additional sales of bonds,

the suspended multiple could be used, when the redemption would proceed as in the beginning. By this scheme it must be observed that the order of redemption of bonds is what might be termed a double numerical order. The coupons of each bond had at least one multiple (4), and three numerals, so that it may be safely stated that the bonds were reached and paid in numerical order. According to this scheme the member holding bond No. 1 would receive \$1,000, while one other member would get \$250 and all the rest nothing. When bond No. 1 was redeemed, bond No. 2, one coupon of which had already been redeemed, became the lowest number and its holder would get the balance of his \$1,000, while seven other coupons were being paid. Then No. 3 became the lowest bond and its holder would receive the money represented by all its coupons, while seven coupons of other members were being paid and so on for every succeeding bond. If a member failed to pay his dues before the expiration of three years he forfeited all he had previously paid.

Sec. 152. The National Investment Company of Washington City, D. C., issued bonds of \$1,000 each, in numerical order. The initiation fee was \$4 and the monthly dues \$4. The maturity fund consisted of twenty-five, the reserve fund of sixty-two and one-half and the expense fund of twelve and one-half per cent of the monthly dues. The bonds were made payable ten years after date but were subject to redemption monthly out of the maturity fund on hand each month in the order of 1, 5, 25; 2, 10, 50; 3, 15, 75; 3, 20, 100; 6, 30, 125; and so on, the company resorting to the numerical order and using the multiple 5 and the numerical 25 in each group of three redemptions, until the multiple 5 extended beyond the number of the bonds issued, when the payments reverted back and were continued as before. The bonds, which were not paid in ten years, were, after that period, redeemed in numerical order. The holders of bonds, that were reached and paid before the expiration of ten years, received the par value of their bonds, less the monthly instalments of the ten years,

remaining unpaid at the time the redemption occurred. In other words the monthly dues for ten years amounted to \$480 and the initiation fee to \$4, making \$484 which the investor was required to pay. This sum, being deducted from \$1,000, the par value of the bond, left \$516, as the amount of the profit to each member, receiving payment. This profit was paid at the end of each month, as each member, whose bond was redeemed, got this sum, and in addition thereto the initiation fee and the monthly dues, paid up to the time of redemption. Thus at the end of one month he got $\$516 + 8 = \$524$; at the end of two months $\$516 + 12 = \$528$; at the end of three months $\$516 + 16 = \$532$ and so on for one hundred and twenty months. A member, whose bond was redeemed at the end of the first month, had paid \$8 and he received \$524, thus realizing \$65 for one in one month, while the member, whose bond was paid at the end of ten years, had paid \$484 and received \$1,000, which was a little more than \$2 to \$1 after waiting that length of time. But these enormous profits, which the lucky holders of bonds received, made it necessary that the unlucky members should lose even the principal sums they invested.

The company also issued bonds for \$500 which were matured and paid in precisely the same way as in the other series, the dues and profits being one-half of the sums given above.

Sec. 153. The Tontine Savings Association, which is the same concern, whose scheme was held to be a lottery by General Olney, issued numbered bonds to its patrons, in numerical order, for \$1,500 each, payable on or before forty years after date. Each bond had three coupons of \$500 each attached, which were numbered from 1, up. An initiation fee of \$15 was collected, which went wholly to the expense fund. The monthly dues were \$3, twelve and one-half per cent of which went to an expense fund, thirty-seven and one-half per cent to a reserve fund and fifty per cent to a maturing fund. Out of the maturing fund coupons were redeemed monthly in the order of 1, 3, 2, 6, 9, 4, 12, and so on, using the multiple 3.

A member failing to pay his dues before the end of five years forfeited all he had previously paid. Here as in the Pettis County scheme each bond had a multiple coupon and two numerical coupons so that the bonds were in fact reached and partially paid in double numerical order. According to this plan if a member received payment of his bond at the end of the first month he would have paid \$18 and would have received \$1,500, making a profit of \$1,482, but if his bond ran for twenty years he would have paid \$1,440 and would have received \$1,500, making a profit of only \$60, and the profits for the intermediate periods would have been unequal, the profits decreasing as the monthly payments increased.

Sec. 154. The National Investment Company, of Cincinnati, issued three classes of certificates, denominated A, B and C. The certificates in class A were for \$1,000 each, in class B for \$500 and class C for \$250. In class A the premium fee was \$10 and the monthly dues \$5; in class B the premium fee was \$5 and the monthly dues \$2.50 and in class C the premium fee was \$2.50 and the monthly dues \$1.25. The expense fund consisted of the premium fees and twenty per cent of the monthly dues; and the balance of the monthly dues was divided into reserve, investment and guarantee funds. The certificates in each class were issued in series of 200. The funds of each series were kept separate and out of the investment fund certificates in the lowest series were paid monthly in numerical order to the extent of that fund then on hand. Then, next month, the company did not begin where it left off the previous month, but began at the lowest number in force in the next series and proceeded till the investment fund for that month was exhausted and so on until all the outstanding series were reached, when the redemption reverted to the lowest unredeemed certificate in the first series and so on again through the series. A table of redemption values was printed on the back of each certificate, which showed that the holder, whose certificate was redeemed at the end of the third month made a profit of 100 per cent and after the third month one per cent was added to the profits each month up to the

seventy-third month, the per cent of profit for that month being 170. By this table the lucky holders of certificates received 100 per cent profit in three months, while those whose certificates were not paid till the end of the seventy-third month made only 170 per cent profit in six years, and of course the great army of unlucky members got nothing. The many lost all in order for the few to realize enormous gains.

Sec. 155. The Columbia Investment Company of Cincinnati issued bonds in two classes, A and B. In class A the bond was for \$1,000, the initiation fee was \$10 and the monthly dues \$5; and in class B for half these amounts. Twelve and a half per cent of the monthly dues was set apart for an expense fund, sixty-two and a half as a redemption fund and twenty-five as a reserve fund. Bonds matured when the net monthly payments to the redemption fund together with the *pro rata* of their reserve credits equaled their face value; but they were redeemed before maturity, after three monthly instalments had been paid, the order of redemption to be determined in that case by taking one per cent (less fractions) of the bonds in force on the first day of the month next preceding such redemption and the number thus obtained was used as a numeral to determine the order of maturity. Thus, if the number of the bonds in force on the first day of a given month be 1,500, the numeral would be 15, that being one per cent of 1,500. Then the first bond to be redeemed would be 1, then 15, then 30, and so on, until the end of the list of outstanding bonds was reached, when the company reverted to the lowest unpaid bond and then proceeded in the same way. The numeral for each month might be and probably was different for each month. The plan, also, provided that when the reserve fund reached the sum of \$50,000 the interest earnings thereon, less expense of managing the fund, might be applied to the payment of bonds in numerical order at their then redemption value and when the reserve fund reached \$100,000 all the monthly dues, except the expense fund, might be used for the redemption of bonds. The redemption value of the bonds in class A was stated to be as

follows; \$33.33 if redeemed at the end of the fourth month; \$41.66 if redeemed at the end of the fifth month; \$50 if redeemed at end of the sixth month and so on adding \$8.33 (\$5 dues and \$3.33 profits) each month. The member who was paid at the end of the tenth year made only thirteen and one-half per cent per annum, while the member, whose bond was redeemed at the end of one year made 112 per cent per annum.

Sec. 156. The Southern Mutual Bond and Investment Company issued bonds in a similar way and redeemed them by the use of the multiple three. The redemption value of the bond was ten per cent per annum on amount invested, which was paid in cash and a paid up certificate was issued for a like amount, which the company proposed to redeem by discounting it ten per cent.

Sec. 157. After the fullest argument both oral and printed by the attorneys, representing these companies, and by the Assistant Attorney-General for the Postoffice Department, representing the Government and after mature consideration and an exhaustive examination of the questions presented, the then Attorney-General of the United States (Hon. Judson Harmon), in an opinion rendered by him on the 24th day of February, 1896, held all these schemes to be lotteries or similar enterprises. 21 Op. Att'y-Gen. 313.

In this controversy, which lasted for several months, it was conceded by the attorneys for the companies that the same basic principle was involved in all the schemes, though varying in detail, and Gen. Harmon, for that reason, "chiefly considered the case of the Pettis County Bond Investment Company" and in the opinion he gave, he had reference to that case alone, as he believed it covered all the others. These Companies, through their attorneys, contended the schemes did not differ in principle from fire or life insurance and that they were in fact "fairer and better because the bondholder does not have to wait to die or lose his property to realize on them." To this contention it was replied, on behalf of the Government, that the principle, underlying insurance, was entirely different from

the principle upon which these schemes were operated. In the one case the contract was a wager, pure and simple, and in the other it was not. In insurance, the insurer deals in the same way with all, similarly situated, while in these schemes the companies by arbitrary methods, discriminated in favor of some of their members and against others, though they had paid precisely the same sums and had complied with precisely the same conditions. If the lives of ten men be insured for one year and, at the end of the year if they are all living, none of them gets anything; if all shall be dead, their beneficiaries would all receive the amounts of their respective policies. But ten men might go into one of these companies and continue to pay their dues for a given time, when one of them would receive what he had invested and in addition a large profit and the other nine would get nothing. This discrimination among members, all of whom have literally complied with all the conditions, could not be fairly made, except upon the theory that they were engaged in a gambling transaction.

Sec. 158. May in his work on insurance Sec. 5, says: "It (an insurance contract) is also what the French writers term an aleatory contract, or one in which the equivalent consists in the chances for gain or loss to the respective parties, depending upon an uncertain event, in contradistinction to a commutative contract, in which the thing given or the act done by one party is regarded as the exact equivalent of the money paid or act done by the other. Each party runs his risks. The insurer will gain the premium if no loss happens; and will be required to make reparation if it does. On the other hand the insured will in the former case have paid his premium to no purpose, while in the latter he will be indemnified for his loss by the insurer."

The same author says: "Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss." Sec. 1.

"Wherever danger is apprehended or protection required, it (Insurance) holds out its fostering hand and promises in-

demnity. This principle underlies the contract and it can never, without violence to its essence and spirit, be made by the assured a source of profit, its sole purpose being to guaranty against loss or damage." Sec. 2.

And hence an insurance where there is no interest is a wagering contract and void. Mr. May again in Sec. 74, says: "But both in England and in some of the States of this country the legislative powers have intervened and expressly declared the invalidity of policies without interest. And even when this intervention has not taken place the courts now, nearly without exception, hold such policies void, not only because in contravention of the fundamental object of the contract-indemnity, since where there is no interest there can be no loss and where there is no loss there can be no indemnity, but because when the insured has nothing to lose but everything to gain by the happening of the event insured against, it would be dangerous and demoralizing to subject the insured to so great a temptation to destroy the property or life upon which the insurance is effected. * * *. And indeed the nearer the insured is brought to the terms of the contract into such position that he can in no event be the gainer, the more nearly will the contract conform to the true principles of insurance." And this is the doctrine of all the writers and courts. 11 Am. and Eng. Ency. of Law 280, and note.

Sec. 159. Speaking of the contention of the operators of the Bond Investment Schemes that the principle of their schemes was not unlike the principle underlying insurance, General Harmon, in the opinion above referred to, said:

"The fallacy consists in confusing mere chance with uncertainty. One's property may not burn at all; and the time he will die is not known; but neither event depends upon mere chance, and the law therefore recognizes contracts contingent upon them while it does not countenance lotteries. Yet the argument advanced applies as well to lotteries as to the preference feature of the business of this company. If the prizes in lotteries had been made to depend upon the

happening of some serious event to which all persons are liable, it is quite likely that the law respecting lotteries would not be as it is. But the name 'lottery,' which originally implied casting lots, now covers any determination of gain or loss by the issue of an event which is merely contrived for the occasion.

It is said also that, as one of the features of these 'investments' is that the bondholders, who persist, gain advantage from the forfeiture of the bonds of those who fail in their payments, the case presented is the same as that of insurance on the 'tontine' plan. If one of these companies should eliminate the preference in payment of coupons to be determined by the mere holding of a lucky number, this question might arise. But the chance of preference lies among bondholders of equal standing in all respects. The fact that the prospects of all who continue to pay are improved by the dropping out of holders of bonds bearing lower numbers, does not eliminate the element of mere chance and therefore does not alter the case.

The principle of survivorship involved in tontine insurance has been the subject of doubt and discussion, because, in its simple form, it has been claimed to be mere wagering among the members on the length of their lives. But it involves no lottery element. If, however, to a series of tontine endowment policies a scheme should be added for paying some of them before maturity according to the determination of any form of hazard, we should have a partial analogy to the present case. But the argument would fail because no such system has ever been held or admitted to be lawful."

Sec. 160. If the Attorney-General had said the payment of an insurance policy is not made dependent on chance, instead of saying that the *event* did not depend on chance his language would be less susceptible of misconstruction. As has been shown in the discussion of the proposition, when a prize is dependent on chance, there is a clear distinction between a real, *bona fide* transaction, in which the profits or losses may depend on events, uncertain in the sense that the

parties do not know and can not know what the outcome will be and wagering contracts. This distinction was evidently intended to be made, for the General says that the "name, 'lottery,' which originally implied casting lots, *now covers any determination of gain or loss by the issue of an event, which is merely contrived for the occasion.*"

The companies seized upon the statement made by the courts in the McDonald case and in U. S. Ex. rel. vs. Sherwood, that the chance element in these schemes consisted in the fact, that no member knew what the number of the bond awarded to him would be and argued that if they would inform purchasers of bonds what numbers they would get, the element of chance would be eliminated. In reply to this contention the Assistant Attorney-General for the Postoffice Department said:

"In the first place this is utterly impracticable. These companies do business all over the United States. If the numbers of the bonds are known to the purchasers at the time of purchase, the company must proceed in one of three ways; first, the application must be made directly to the company at its headquarters, or, second, it must appoint agents to receive applications and sell bonds, or, third, it must sell bonds from headquarters and through agents at the same time. No matter which course it may adopt it will be impossible for purchasers to know the relative positions of their bonds in the order of redemption. It is true they may know the numbers of the bonds they receive, but what I mean to say is that they can not know the relative positions of their bonds in the order in which they will be paid. Suppose the company sells no bonds except from headquarters and has no agents at all. Then a man ordering from a distant place could not know the next lowest bond unsold in order to apply for it, and hence he would be compelled to send in his application and leave it to the officers of the company to insert any number they saw proper, and this would subject the scheme to the same objectionable features that were condemned in the above cases, for

he would not know the number of the bond he was to get before buying. If the company should notify him at his request what number of bond he could get, it would have to give him the next lowest bond unsold or put it so far ahead as to be absolutely certain that it would not be sold to someone else before it could be accepted. In either event, if the applicant should refuse to take it, it would leave that bond unsold and other bonds of higher numbers than that one would in the meantime have been taken, and in dealing with a country as large as the United States it would be impossible for the company to sell bonds from its headquarters and designate in advance exactly what bonds a man could get. If the company should appoint agents in different parts of the United States it would be compelled to furnish them each with certain specific bonds; it would have to give the agent in Texas bonds of a certain number, the agent in Maine bonds of a certain number, and so on in every State in the Union. The man in Texas might have the bonds from 1 to 100 and fail to sell any of them, whereas the man in Maine might have the bonds from 1,000 to 1,100 and sell them all before the bonds prior thereto, or any considerable number of them, had been disposed of. When a man buys, say, 1,001, it is upon the theory that 1,000 bonds have actually been sold and 1,000 men are then paying their dues to the company in order to redeem them. But it may turn out, and probably will turn out, that not half of these bonds have been sold, and the man takes No. 1,001 and instead of being in the relative position of redemption indicated by the number, his relative position in the order of redemption may be 500, and hence I say it is utterly impossible, no matter what plan of business the company adopts, for a man to know the exact position of his bond in the order of redemption, and it is mere chance as to whether his bond will be redeemed early or late. If the company sells higher-numbered bonds before all the lower numbers are sold the doors will be wide open for it to perpetrate upon its patrons the most stupendous fraud by claiming that the company is entitled to the redemption of all bonds

not sold, just as lottery companies make all tickets unsold belong to them and receive the prizes drawn by them and besides that the company would pay no dues on the bonds not sold, and hence the higher numbered bonds would not be redeemed at as early a date as they would be if the bonds were in the hands of *bona fide* purchasers who were paying dues thereon; hence it is patent that it will be a matter of chance as to the redemption of these bonds.

In the second place, even if a patron knows the number of his bond, and that number is at the time he buys the lowest unsold number, yet he can not know the order of its redemption. He may know its order at the first drawing; that is, at the first monthly payment of bonds by the company; but when he is called upon for the second payment it will be utterly impossible for him to know when his bond will be reached and paid, for the reason that that will depend upon the number of bonds redeemed, the number of bonds allowed to lapse, and the number of new bonds sold. All of these elements affect the order of redemption and over none of them has he any control. He can not know whether a man will continue to pay his dues or whether he will be able to pay his dues, nor can he know how many men will buy bonds of a higher number than his own, or whether any will and how long they will continue to pay if they do buy; and this contingency will continue at every monthly payment of bonds. A man goes to the office when the money is distributed and asks if his number has been reached. He is informed that it has not. He then inquires when it will be reached, and is informed that it is not known. He inquires why it is not known, and he is told that it depends entirely upon the payments made by other bondholders both prior and subsequent to his, and it is unknown what they will do they may pay and they may suffer their bonds to lapse. He goes to the company at the next monthly payment and he is given the same information. He pays again and takes his chance at the next drawing; the same result follows, and in time he becomes disgusted and quits, and thereby affects others."

And on this point General Harmon, said: "It is now claimed that the subscriber takes no chance whatever, because he does not embark in the scheme unless he sees from his bond when presented that it bears one of the numbers which entitle its coupons to payment early enough to suit his views of expected gain.

This is ingenious and specious enough, no doubt, to induce subscriptions by the unthinking. At any rate the company is eager to make the attempt, though it is not willing to eliminate the preferred coupon feature. But it is manifest that if every subscriber, by merely comparing the number of his bond with the order of numbers printed on the back of it, could tell, with any approach to certainty, the order in which his coupons would be reached for payment, nobody would take the bonds which are to be passed by; and unless these are taken there is an end of the business. One might as well try to run an ordinary lottery without blanks as such a preference investment scheme without any unpreferred. Some must lose what others gain. It is manifest upon the slightest reflection that, as all the subscribers have the same right of rejection upon the presentation of the bonds, and the numbers are given upon presentation for issuance, no subscriber can possibly tell how many of the bonds bearing lower numbers than his own are really outstanding when his bond is presented. So that it may justly be said that the change has made the chance feature of the scheme worse rather than better because, if the elements of uncertainty are not in fact increased, they are given a fictitious appearance of certainty."

Sec. 161. These companies contended also that, even, if chance did enter into their schemes, it determined only the time when their obligations should be redeemed and that took them out of the category of lotteries and they quoted, with much confidence, this language from the opinion of Judge Blodgett in the Zeisler case, 30 Fed. Rep. 499: "If these drawings determined only the time when the bonds would be paid, I should say the determining of that time by lot or

drawings would not give them the characteristics of a lottery." The correctness of the principle thus laid down by Judge Blodgett in that case may be conceded; but the Judge proceeded to state that "when a city or government, in order to make an inducement for people to buy their bonds, holds out large prizes, to be drawn by chance or determined by lot in the manner in which prizes are usually determined in even an honestly conducted lottery, it seems to me it comes clearly and distinctly within the inhibiting clause of the Statute; * * * and hence it seems to me that the purpose of the scheme was not only to determine by lot when the bonds were to be paid, but also to determine certain extraordinary chances to the holders of the fortunate numbers drawn." So in the Bond Investment Schemes, if the lot or chance determined nothing but the time when the obligations with interest to date of payment would be made the prize element would be wanting; but it did more. It determined not only when the amount contributed by a member, with interest, should be paid but also a large sum in addition to the sum invested, which was not earned by way of interest or in any other legitimate way. In the Horner case the Supreme Court of the United States approved the distinction made by Judge Blodgett, in the Zeisler case, and announced that when the chance determined when a large sum in addition to the face of the bond and interest thereon would be paid, it was a lottery. In other words where prizes are distributed by lot or chance, there is a lottery or similar enterprise. There can be no lottery where there is no prize. The United States had the right to pay some of its bonds after the expiration of five or ten years, though payment was not demandable till the expiration of twenty or forty years, and it exercised the right to redeem and did redeem some of these bonds, and, it is probable, selected those to be redeemed by lot or chance, or arbitrarily, which is tantamount to the same thing; but it can not be claimed that the Government conducted a lottery scheme, simply because it did not distribute prizes to those, whose bonds were paid. It simply paid the principal and interest

to date of payment, and hence the prize element of a lottery was wanting.

So Railroad and other corporations sometimes issue bonds and insert a provision that out of the surplus funds, they may have on hand from time to time, they will redeem bonds, paying their full value and the interest thereon to date of payment and the bonds to be redeemed before the full maturity period shall be determined by lot. In such case the scheme is not a lottery, because it lacks the prize element. The same principle is applied in case of partition of property among joint owners. The property is divided into equal parts and the parts to be assigned to the respective owners may be determined by lot without bringing the transaction within the meaning of a lottery, simply because no prize is awarded to anyone.

Sec. 162. Up to the time of the rendition of the opinion by General Harmon in February, 1896, the Postoffice Department had permitted some of the Bond Investment Companies to do business through the mails where they promised to pay simply the amount invested with interest thereon at a rate not exceeding ten per cent per annum and a proportionate share of the profits in excess of ten per cent interest, on the distinct ground that it was thought this eliminated the prize element from the schemes though the lot or chance element still inhered in them; but after that opinion was rendered the Department held the schemes to be lotteries or similar enterprises, notwithstanding the limitation or supposed limitation of the profits paid. This change in policy was based on two grounds. First. It was found by experience that the companies, according to the schemes they devised, could not pay the profits they promised to all their investors. As in the cases given above the companies retained a large per cent of the income to defray their expenses and then set aside the largest part of the remainder of the income for the monthly redemption of their obligations, so that the part that could earn any interest or make any profits was very small. In order to enable the companies, therefore, to pay even ten per

cent profit to the lucky members, they provided that if the investors failed to pay their dues before a specific time, varying from two to seven years, they would forfeit all they had previously paid, and that after certain periods, varying from two to seven years, the members, whose bonds were not reached and paid prior to that period, might take paid up obligations, sometimes for the amounts of the reserve fund they had contributed and sometimes for other amounts, but always less than the full amounts they had contributed and these paid up obligations were redeemable in the same order as in the original plan. Thus there was an inequality of benefits among members similarly situated, which was the result of the chance element in the schemes.

Besides this it was found the companies *estimated* their profits in excess of ten per cent interest and by doing that they contrived to pay the same old profits to the lucky members, whose bonds were reached and paid monthly in numerical order, or by the use of a multiple or numeral and thus perpetrated a fraud upon the Department and the public.

Second. From the opinion of General Harmon it was plain the determination of gain or loss to the members was by the issue of an event which was "merely contrived for the occasion."

Sec. 163. In England, it seems, the weight of authority is in favor of the principle involved in the Bond Investment Schemes. In *O'Connor vs. Bradshaw*, 5 Ex. 882, the object of a company was to raise subscriptions in small sums, to purchase land, erect dwellings thereon, and allot them to its members, on such terms, as should enable them to become freeholders, and obtain other privileges, according to the number of shares they held. Their right to obtain these privileges was not absolute, but depended upon the result of a ballot, according to which, a small number only of the subscribers could obtain present possession of houses and the proportion of those who had obtained them during five years was very small. The Lord Chief Baron was of opinion that this constituted a lottery scheme. Baron Park, however, did

not concur in this. He put this as an illustration: "Suppose a number of persons were to buy a large collection of pictures, some of which far exceeded others in value, might it not be decided by lot, who should have the first choice?" But the company being illegal on another ground, the point was not decided.

Sec. 164. The next case of this kind is *Sykes vs. Beadon*, 11 Ch. Div. 170. The association in that case was formed on the principle of investing the subscriptions of the members and dividing the capital fund and profits among themselves by means of certificates, convertible by annual drawings by lot into preference dividend bonds, bearing interest, with a bonus. The Master of the Rolls, without deciding the point finally, said: "I have grave doubts whether this association is not illegal, as being within the Lottery Acts. Building Societies are in a different position—they are loan societies. In an association such as this, it is not a case of loans to be returned, but of subscriptions to be divided. The subscriptions are to be divided among the subscribers by drawings by lot and the prize is a bond with a bonus. The holders of certificates are persons, who subscribe money to be invested in funds, which are to be divided among them by lot and divided unequally. That is, the persons, who get the benefit of the drawings, get a bond, bearing interest and a bonus, which gives them different advantages from the persons, whose certificates are not drawn, and it depends upon chance, which gets the lesser or the greater advantage. It is, therefore, a subscription by a number of persons to a fund for the purpose of dividing that fund between them by chance and unequally. If that is not a lottery it is very difficult, at all events to my mind, to understand what a lottery is.

It is called a division by lot, which means lottery. It says that the selections of certificates shall be by lot, and that is to be done in the ordinary way, by chance, and the benefits, as I said before, are unequal."

Sec. 165. The next case, in which it was sought to bring a company of this character within the lottery Acts, is *Wal-*

lingford vs. Mutual Society, 5 App. Cas. 685. The objects of this society were, ostensibly, to advance the interests of its members and the mode of operation was to obtain monthly subscriptions from the members and to advance capital to them at interest upon certificates of appropriation, which were given to the members on joining the Society, which certified their right to receive advances and share in the profits. Holders of life certificates were entitled to tontine bonuses. Advances were allotted to the members as follows: The first and every fourth one thereafter by drawing, free of any premium or interest, while the intermediate appropriations were allotted to the member or members tendering the highest premium. These advances were to be repaid by quarterly instalments. It was urged that this scheme was illegal under the Lottery Acts, as the benefits of the society were to be given to the members by lot or chance. On appeal to the House of Lords it was unanimously held that the Society did not come within those Acts. Lord Selborne thought those Acts had reference to gambling transactions only and in his judgment, the scheme in question was not a gambling transaction and therefore the Acts could have no application to it. Lord Hatherly said: "If this were to be held a lottery nearly every building society and a great many other societies, formed upon a similar footing, might be found to fall within the enactments against lotteries." This case is in direct conflict with the decision in Sykes vs. Beadon and in effect, though not in terms, overrules it and it is thought since this decision of the House of Lords and the case of Smith vs. Anderson, 15 Ch. D. 247, it must be taken that there is, in England, nothing illegal in a company or partnership distributing dividends or profits by lot.

Sec. 166. The first time the question, whether these schemes came within the Lottery Act of Congress, was presented to the courts for determination, was in the latter part of 1893 in the case of the United States vs. McDonald, 59 Fed. Rep. 563, before Judge Grosseup at Chicago. The plan of business of the company, which McDonald advertised

through the mails, was this: The company issued numbered bonds of \$1,000 each in numerical order to its members. For these bonds the applicant had to pay \$10 as an initiation fee and \$1.25 per month afterwards. The company set apart twenty per cent of the monthly dues as an expense fund and eighty per cent as a so-called trust fund for the redemption of bonds, which were reached and paid in the order of 1, then 5, then 2, then 10, and so on, the priority alternating between the unpaid bonds, bearing the lowest number and the unpaid bonds, bearing the lowest number divisible by five, one class being known as numerals, and the other class as multiples.

Judge Grosscup in his charge to the jury in that case used this vigorous language in relation to the character of the scheme:

"The court of course is not sitting here to pass upon the fairness of any such transaction. Two hundred years ago, when coaches were robbed by highwaymen on the heaths of London, it was always said that the highwaymen acted with courtesy, but nobody but an ignorant fool returned to London without knowing he had been plundered."

The Judge then proceeded to charge the jury in regard to the lottery features of the scheme. After stating that every enterprise, in which men engage, has a return or prize or is supposed to have and that the hope of this is an incentive to business activity, and giving life and tontine insurance as illustrations of legitimate transactions, he said:

"In the case at bar the return or prize is \$1,000. Now, is that determined by lot or chance? Is it determined by one of the laws of nature, or of industrial growth, which determines the other returns of life? Let us look at the practical workings of the scheme. Let us look at it first, independently, of what is called the multiple system. Here is a company which in two years has taken in more than fifty thousand applications. In order to make a return certain to each of these applicants of the amount of money promised in the bond, it would be necessary that the company should have a fund

of \$50,000,000. In two years they have only accumulated a fund of \$206,000. According to the constitution of the company, outside of lapses, there are 50,000 men who are entitled to these returns if they persist in paying. In two years, 206 have been paid. If each man were to get a return according to the promise of the company, outside of lapses, and every dollar which went into the fund of the company were to be used for that purpose, and no man to receive more than what he paid in, it would take one thousand months, or more than eighty-three years, for each man to receive back his return. This money would be idle, not growing by interest or other investment. Is it not perfectly apparent that from the very necessity and constitution of the scheme, if the multiple system were not introduced, the company could not go on, and no man would receive back anything except those who had been the fortunate possessors of the first bonds? It is said, and is one of the boasts of the company, that everybody who has been paid back has been paid \$1,000 on an investment not to exceed thirty dollars.

That again shows the entire impossibility, according to the constitution of the scheme, of but a limited few, one in a hundred, ever receiving any return or any prize except for the lapses. Because money lying idle in the treasury, shorn in the first place of twenty per cent of the amount, will never grow to pay one thousand to one or one thousand to thirty, so long as the present economic law of the universe prevails. These defendants have foreseen this, and foreseen that the company must therefore come to an immediate end, and have constituted what is called 'the multiple system.' Thereby a chance is held out to men, even after the company has grown to be fifty thousand, to receive an early payment of his bonds. But upon what is that chance dependent? What determines that return or that prize? Any law of nature, or of industrial growth, such as applies to insurance companies, or real estate investments, which I have used as illustrations? Not at all. It is solely dependent upon the order in which his bond may go through the registration process. If he draws

a multiple, and the company continues, he eventually will be paid.

If he draws a numeral, it is as morally certain as any law of the universe, that unless the company is almost entirely abandoned by its bondholders, he will never be paid.

It is said here in argument that the lapses will secure certain payment in time; in other words, enough men will become discouraged at the outlook and will drop out, so as to advance those whose bonds are deferred. What does that mean? It means that by the very constitution of this company the success of its enterprise depends entirely upon its insolvency, its gross and well-known insolvency—so insolvent that in the very method of its organization no hope of its carrying out its promise can be entertained. Now the court can not say that that is a legitimate enterprise, promising a certain return of money, which, by the very constitution of the company, is dependent upon the insolvency of the company and a wholesale repudiation of its promises. That is not the rule of any other legitimate enterprise. The determination, therefore, of the return or prize is dependent upon a chance or allotment.

The only substantial difference between the scheme disclosed to you by the proof and the well recognized lotteries of the world, such as the Louisiana Lottery Company, is that the latter are, in comparison, honest and free from the opportunities of chicanery. The wheel of the lottery and the hat of the raffle are to the fortune hunter incomparably fairer contrivances for the determination of his chances. He is not dependent in them upon the honesty or accuracy of a secretary with whom it is as easy to put one application through the register as another. The whole scheme disclosed by the proof is a cunning trick to attract the cupidity and ignorance of men. A great menace to the civilization not only of the United States, but of the world, is the growing tendency to gamble or engage in lottery. Two hundred years ago their promoters were characterized in the streets of England as rogues.

No prospect is so attractive as that which is wrapped up in the mysteries of a chance. To the winner comes some money, many congratulations, wide advertisement throughout the newspapers, and the propensity to go in again. To the losers, one hundred-fold in number, come stripped homes, impoverished wives and children, lost opportunities of building up a competence legitimately, and, in too many instances, the temptation to go in again upon means that are obtained from an employer, or *cestui qui* trust, first by a supposed borrowing, then by intentional theft, forgery, and embezzlement. The rainbow of hope lures and lures until its chaser falls over the precipice into suicide or the penitentiary."

McDonald was convicted by the jury and was sentenced by the court to pay a fine and to be imprisoned in jail, for eleven months, and on his appeal to the Circuit Court of Appeals of the Seventh Circuit this sentence was affirmed, 63 Fed. Rep. 426. The Federal Court of Appeals, per Wood, Judge, thus describes the plan of business of the company: "By the table which determines the order of payment, bond No. 1 is payable first, No. 5 next, No. 2 next, and so on, alternating between numerals, so-called, and multiples of 5, except it will be observed that between every fourth and fifth of the multiples no numeral intervenes. There are 4 numerals to every multiple, and it follows that a bond, which might as well be called a ticket, bearing a high multiple number, will be entitled to payment sooner than three-fourths of the bonds bearing lower numbers among the numerals, and the further the process is carried the greater becomes the disparity between the multiple and numeral numbers next to be paid, and correspondingly the bonds numbered with numerals, except as benefited by lapses, become less and less valuable, because the day of possible payment becomes more and more remote."

Judge Woods adds: "The element of chance which condemns the scheme is *incident to the numbering of the bonds before issue*, and not directly to their payment afterward."

The operators of the scheme in that case contended that the order of the payment of bonds being determinable by the

multiple system, a new invention, the inducement to purchase a bond was as great at one time as another. The court held, however, that "whether or not a purchaser will obtain a bond of one number or another depends upon the order in which his application shall reach the hand of the secretary, and that is largely a matter of chance. The secretary receives applications by mails and otherwise, sometimes singly and sometimes a number together, and in the order of receipt and as he chances to take up one or another first, passes them through a registering device, and in accordance with the notations so made upon the application the bonds are numbered and issued." It was further urged that since the only element of uncertainty was as to the date at which the bonds were to be paid this was not sufficient to characterize the business as a lottery but the court held that this contention ignored the element of chance incident to the numbering of the bonds before they were issued and that but for the purchaser's hope or as might be well said for his chance of getting a multiple number, the business would soon cease. The further contention was pressed upon the court that since every bondholder who continued to pay his dues would ultimately receive the promised sum, the prizes were equal and therefore there was no lottery. Judge Wood justly answered: "It is idle to say that a sum or an obligation for a sum, due and payable to-day, or at an early day, is of no more value than an obligation for an equal amount without interest, payable at a remote and indefinite time." The court might have added, on this point, that the members who were paid at an early date did not pay nearly as much as those who were paid at a remote period though by the scheme each received \$1,000. For instance, the member whose bond was paid at the end of the first month had invested only \$11 25-100 (the initiation fee of \$10 and one month's dues, \$1.25), while the member whose bond was reached and paid at the end of ten years had invested \$160.

Sec. 167. The next case, involving the principle of the Bond Investment Schemes, arose in February, 1894, before Judge Bradley of the Supreme Court of the District of

Columbia, in the case of the United States ex rel. The Old Colony Company vs. Sherwood, postmaster at Washington City, which was a proceeding in which it was sought to have the court compel the respondent by mandamus or mandatory injunction to receive and transmit the advertisements of the company through the mails. In the scheme involved in that case, the company issued certificates numbered from one, up and redeemed them in the order of 1, 3, 11, 2, 6, 22, 3, 9, 33, 4, 12, 44, etc., thus combining the numerical, the multiple and the numeral systems, to determine the order of maturity of the certificates. In each group of three redemptions the company resorted first to the numerical order, then to the multiple 3, and lastly to the numeral 11. The company claimed that each investor was informed at the time of his purchase what would be the number of his certificate. An initiation fee was charged and small sums as monthly dues were required. Judge Bradley dismissed the bill, holding that the scheme was a lottery but he filed no opinion and there the case ended.

Sec. 168. In the summer of 1894, the National Investment Society of Washington City instituted a proceeding in the Supreme Court of the District of Columbia before Judge McComas against Postmaster Sherwood, to compel him, by mandamus or mandatory injunction, to receive and transmit, through the mails, the society's advertisement of a Bond Investment Scheme, which in substance was as follows: The Society proposed to issue shares to the amount of \$50,000,000, in denominations of \$100 and \$50, the \$100 shares being designated as A shares and the \$50 shares as B shares. Two denominations of certificates were to be used, one containing 10 A shares and one containing 10 B shares. The certificates were to be numbered consecutively in the order in which applications were filed, and the 10 shares in each certificate were to be numbered from 1 to 10, inclusive. The shares were payable at the end of ten years absolutely but provision was made for their redemption monthly, to the extent of the money on hand, in the following order: Share No. 1 in certificate

No. 1, then share No. 1 in certificate No. 2, and so on, paying the first share of each certificate in force until *the end of one year from the date of payment of the first share*, when share No. 2 in certificate No. 1 would be next in order of payment, then share No. 2 in certificate No. 2 and so on, until the second share in all the certificates issued the previous year and still in force had been paid, when share No. 3 in certificate No. 1 would be next in order, then share No. 3 in certificate No. 2 and so on as before, until each share in certificate No. 1 had been used as a starting number and the ten series finished, after which the lowest numbered share in the lowest numbered certificate, then in force, would be taken as a starting number and the same rule was followed as in the previous series for all time. The holders of shares were required to pay monthly seventy cents on each A share and thirty-five cents on each B share. The first two months' dues were set apart as an expense fund and the dues after that were divided into, first a redemption fund of 71 3-7 per cent; and second a reserve fund of 14 2-7 per cent; and third an expense fund of 14 2-7 per cent.

Judge McComas, after full argument on both sides of a demurrer filed by the respondent, carefully prepared an opinion in which, after quoting at length from the opinion of Judge Woods, in the McDonald case, said:

"I adopt the reasoning of the court in the McDonald case and, therefore, regard the scheme of the National Investment Society as a lottery, 'or similar enterprise offering prizes dependent upon chance.' The postmaster rightly refused to permit these letters and circulars concerning such an enterprise to be carried through the mail.

* * * * * * * *

The plan of the National Investment Society, as set forth in the letter, circulars and by-laws, shows that it is impossible for the members to share equally in the funds, and that the more fortunate applicants are those whose certificates bear the earliest numbers, that the number of the certificates and their consequent value depends upon chance.

In different states applicants on the same day may mail subscriptions for certificates in this company. Whether or not an applicant will receive a certificate of one number or another depends upon the order in which the applications may reach the officer of this company who issues the certificates, and that is a matter of chance. This officer receives these applications by mail or otherwise; it may be one at a time, it may be many at the same time, and according to the order in which he chances to receive them or as he chances to take up one or another and determines the number of each applicant's certificate, the certificates are numbered and issued. He who by these chances luckily receives an earlier number will be paid sooner and will pay in less money than another who, subscribing on the same day, receives a later number, and will by these chances be required to pay longer and pay more money and wait longer for payment of his shares."

The Society appealed this case to the Court of Appeals of the District of Columbia but Sherwood having gone out of office before it was reached, that court refused to entertain jurisdiction, though the Assistant Attorney-General for the Postoffice Department proposed to waive the point.

Sec. 169. In the spring of 1895 the officers of the Equitable Investment Company were indicted in the United States District Court at Council Bluffs, Iowa, (Judge Woolson presiding), and were convicted of conducting a lottery through the mails. The company in that case issued numbered bonds to its members in numerical order and redeemed them in the order of 1, 3, 6, 2, 9, 18, 5, 21, 24, etc. Judge Woolson held that the scheme was a lottery enterprise but his charge to the jury was never published. There was no appeal.

Sec. 170. *McLaughlin vs. The National Mutual Bond and Investment Company* (64 Fed. Rep. 908) is a leading and important case on the schemes now under review, because it is the only case that has been before the courts involving the numerical order alone of the redemption of obligations. The representatives of this scheme vehemently contended that there could possibly be no chance in a plan where the obliga-

tions of the company were redeemed in numerical order. That case was decided by Justice Dallas in the Circuit Court of the United States at Philadelphia.

The company in that case was incorporated under the laws of West Virginia for the purpose of selling bonds on monthly instalments and to redeem them according to a plan that insured perfect equity "to both large and small investors, the advantage of the association being to encourage and assist persons of moderate means to systematic saving, and by advantageous co-operation, to realize larger profits than they could by investing in savings banks or building associations." The company issued and sold bonds, which were, in form, certificates of its agreement to pay \$1,000 to the person named in each bond, no definite time for such payment having been fixed. The holders of the bonds were each required to pay \$4 monthly and \$1 quarterly and a failure to pay the dues forfeited all the money paid. The company stipulated to pay \$1,000 to the owner of each bond when the monthly instalments paid by him and his share of the reserve fund should amount to \$1,000; or in the alternative would refund him the amount of his monthly instalments, paid by him, with interest at the rate of two per cent at or after the expiration of three years. The bonds were subject, however, to redemption in numerical order by the payment of the following amounts: \$336 if the bond was redeemed during the first year; \$440 if redeemed during the second year; \$561.33 if redeemed during the third year; and \$1,000 if redeemed any time after the fifth year. It was nowhere stated what part of the instalments was to be appropriated to make these payments but that it was very large is apparent.

Justice Dallas thus characterizes this scheme:

"Of course any misguided person who might be led into such a transaction would, on perceiving its character, hasten to withdraw from it, even at the sacrifice of payments already made, or would await only the expiration of the period of three years to claim the refund provided for. But nothing he could do would profit him. Even if the company should

be able to, and should in fact refund him his monthly instalments, with the interest stipulated, he would not be repaid in full. At the end of three years he would have paid as monthly instalments \$144, and this, with 2 per cent interest added, would make \$146.88, the amount to be refunded; but his 'quarterly dues' for the same period would be \$12, which, being added to his monthly instalments, \$144, would make a total of \$156; and hence the so-called 'refunding' would consist in returning to him, after three years of waiting, \$10.88 less than he had actually paid in. Manifestly there would be nothing in this 'to encourage and assist persons of moderate means to systematic saving, and by advantageous co-operation to realize larger profits than they could by investing in savings banks or building associations.' "

And after stating that a bondholder whose bond was redeemed the first year would make an excess of \$286.68 over and above the instalments, paid by him and interest thereon, Judge Dallas continues:

"According to the plan, this excess of \$286.68 must be provided for from the forfeited or nonforfeited instalments—either or both—paid in by others. If from forfeited instalments, the one man wins what the others have, by misadventure, already lost, and if from nonforfeited instalments, then the lucky individual gains extravagantly at the cost of later purchasers, for these must be additionally postponed in order that he may be immediately and excessively paid, and many of them must suffer a total loss through the ultimate exhaustion of the fund by the 'redemption' of 'bonds of a lower number' at an enormous and unconscionable premium. This might be deemed fair play by those who wittingly engage in games of chance, but as a method of 'systematic saving' provided for unwary 'persons of moderate means' it certainly does not 'insure perfect equity' as equity is understood by courts of justice. It appeals to cupidity, not to thrift, and lures to hazard, not to providence. It is a contrivance for handing over to some of those who embark in the venture the money of others who join in it; and it is quite apparent that this can only continue so

long as the treasury can be replenished by bringing in new members. Its inherent vice is substantially the same as was pointed out with respect to a similar concern in the case of the National Endowment Company (142 Pa. St. 450; 21 Atl. 879), and of which the Supreme Court of Pennsylvania said:

'It manifestly belongs to that class of associations, by far too numerous, the practical effect of whose operations is to enrich a few at the expense of confiding and ignorant people. Such corporations are unlawful and injurious to the community.'

It is evident that the attractiveness of the present project is due to the opportunity which it affords for acquiring money by chance, and not as the reward of industry, frugality, or sagacity. The interesting question to those who participate in it is one of fate, and nothing else. It is this: Which of them shall be forced to forfeit, and so 'fall in fortune's strife;' and which of them, surviving that catastrophe, will have obtained redemption of their bonds before the final and inevitable collapse occurs? Upon these contingencies the monthly and quarterly payments are put in jeopardy, and according to the issue of the game, the company, the holder of the stakes, distributes them among the winners. All such schemes are inhibited. They are deceptive and fraudulent, and in their nature simply gambling. In re National Endowment Company, *supra*; Brua's Appeal, 55 Pa. St. 294; United States vs. McDonald, 59 Fed. 563; Horner vs. United States, 147 U. S. 449; 13 Sup. Ct. 409."

Sec. 171. The case, cited by Judge Dallas, in 142 Pa. St. 450, presents a similar state of facts. There certificates for \$200 were issued and redeemed in numerical order. The lower court said, and the supreme court approved it, that "The scheme or plan of this company convinces us that this is not a society for beneficial or protective purposes to all its members, but it is a beneficial society to its officers and a scheme to hand over the sum of \$200 to a few of the first members who join, at the expense of those coming in later, and this on an investment of about \$50 by each of the fortunate low-num-

bered certificate holders. It is quite apparent this can only continue so long as the treasury can be replenished by bringing in new members." Speaking of getting new members the court says:

"This is where the vice of this beneficial society appears. Each member finds that his only hope for realizing his \$200 depends on getting in as many new victims as possible. It should be noticed that this endowment fund is not being invested so as to earn or accumulate anything. As often as \$200 accumulates in the treasury, the lowest numbered certificate holder takes it. It is very plain that each member who grasps the desired \$200 gets out \$150 of money that never belonged to him and his investment never earned. It is equally plain that the time will come when new members will cease to join and the treasury will be empty and a large number of certificate holders will not get a cent, although they have paid their dues and assessments just as promptly as their more lucky associates who have carried off the \$200 each."

The court refused to continue the incorporation of the company, which action was on appeal sustained by the Supreme Court.

Sec. 172. The United Indemnity Company of Los Angeles, California, conducted a business, the essential features of which were as follows: In consideration of a membership fee of \$5 and monthly dues of \$2, it entered into contracts with persons who desired to become members, purporting to be contracts of indemnity in case of sickness, accident or death and issued to them certificates containing the usual provisions of similar insurance policies. To each certificate were attached 50 coupons of \$10 each, numbered consecutively, those on the first certificate from 1 to 50, those on the second from 51 to 100 and so on indefinitely. The certificates were issued in the order in which applications were received by mail or otherwise and there was no means of knowing prior to the issue of the certificate how many had been previously issued nor what would be the numbers of the coupons attached to it. It was provided that one-half of the amounts received from

monthly dues should constitute a so-called "maturity fund" and whenever there should be enough money in that fund to pay one or more coupons, coupons should be redeemed in the order of 1, 5 and so on, in geometrical progression with the multiple 5, until the highest numbered coupon was reached; then returning to the coupon numbered 2, then 10, etc., in a second series with the multiple 5, and so on, until the numbers of all the coupons sold should be included in some series. It was also provided that at the end of three years each certificate holder should receive the full amount paid in monthly dues; at the end of five years \$150; at the end of seven years, \$300; and at the end of ten years, \$500; and these payments were to be made out of the "maturity fund." One-fourth of the monthly dues constituted "the accident, sick and death fund," and one-fourth, together with the membership fees, constituted "the expense fund." It was also provided that any coupon maturing by the multiple system should have deducted from it any excess above double the amount of monthly dues paid thereon.

This was, in *U. S. vs. Fulkerson*, 74 Fed. Rep. 619, held to be a lottery scheme. Judge Wellborn, speaking of what constituted a lottery in that case, said: "It may be sufficient to say it embraces the elements of procuring through lot or chance, by the investment of a sum of money or something of value, some greater amount of money, or thing of greater value. When such are the chief features of any scheme, whatever it may be christened or however it may be guarded or concealed by cunningly devised conditions or screens, it is, under the law, a lottery." After quoting the language of Judge Deady in *U. S. vs. Wallis*, 58 Fed. Rep. 942, Judge Wellborn continued: "The scheme provides that one-half of the total receipts of the company, outside of the membership fee of five dollars, shall constitute what is called a 'maturity fund,' which fund, as fast as accumulated, is re-distributed among the subscribers according to a plan characterized with as much uncertainty and chance as it is possible to impart to any scheme. It should be remembered, in this connection, that

the 'maturity fund' is not put at interest or in any way invested but simply paid back, as fast as accumulated, to certain of the subscribers. This fact itself argues the existence of that gambling element which the law condemns, for no man, however absolutely he relied upon the ignorance and credulity of his intended dupes, would ever devise or promote a scheme, whereby persons are invited to raise, by voluntary subscriptions, a fund solely for the purpose of re-distribution among themselves, unless to each there was offered a chance of getting back something more than he contributed. The element of chance, however, is specifically and clearly discernible in the fact that the numbers of the coupons, which any particular person receives, depend upon the order in which his application goes into the company and that the determination of what coupons shall be paid is made to depend upon a device of numbers whose operations are such that it is utterly impossible for anyone to know the result, until the same has been accomplished. It is true no wheel is employed, from which at stated periods tickets are drawn, but the machinery of the scheme, embracing the postal establishment of the United States, is perpetually in motion and prizes, in the shape of so-called matured coupons, continually distributed to those who secure the lucky numbers."

Sec. 173. The principle of the Bond Investment Schemes was, in one of its phrases, involved in the case of *McLanahan vs. Mott*, 73 Hun. 181, where it appeared that the North River Bridge Company, a corporation organized under an act of Congress, in order to raise money to build a bridge over the Hudson River from New York City to New Jersey, proposed to "issue \$100,000,000 of bonds secured on its property, maturing four hundred and fifty years after date, with interest at 6 per cent per annum, payable 2 per cent semi-annually, the remaining 2 per cent at maturity, with a provision that at each semi-annual payment of interest, \$400,000 shall be used to redeem bonds, to be designated by the trustee, at their maturity value." And the supreme court, general term, New York City, holding the scheme to be a lottery, said:

"It is not at all likely that the whole or any considerable part of an issue of \$100,000,000 of bonds, in the denomination of \$100 each, bearing interest at 4 or at 6 per cent, and having nearly five centuries to run, and with no other property or security behind it at the date of issue than a mere mortgage on a franchise, would be marketable without some special inducement to purchasers; and that has been provided here. The redemption feature which holds out the hope to a purchaser of speedily obtaining ten-fold for his outlay, and, as it were, by the turning of a wheel or the casting of lots, is the real attraction. It defines the whole plan, stamping it with the character of a lottery, all the real qualities of which it possesses. The element of selecting bonds for redemption is not of itself an objectionable feature. It is the chance of winning at an early drawing ten times the face value of a bond that constitutes illegality if there is any illegality in the scheme. There are various definitions of the word 'lottery' given in the books, no one of which includes each and every known or conceivable scheme that properly may be designated by the term. It would serve no useful purpose to refer to them here. Let it suffice that we are satisfied that the scheme of redemption of the bonds adopted by this corporation constitutes a 'lottery' in the popular as well as in the technical sense of the term, and that it is apparent that on that feature reliance is placed for finding a market for the bonds."

And after quoting from Judge Blodgett's opinion in the Zeisler case, 30 Fed. Rep. 499, to the effect that the drawing not only determined when the bonds should be redeemed but determined also "certain extraordinary chances to the holders of the fortunate numbers drawn," the court added: "In the present case, one of the 'extraordinary chances' is that of a fortunate holder getting four hundred and fifty years' interest at 2 per cent in six months."

Sec. 174. The only exception to this line of decisions on this class of cases is *Union Investment Association vs. Lutz*, 50 Ill. App. Reps. 176. In that case it appeared that the Association issued bonds in three classes, A, B, C; in class A for

\$200, B \$1,000, and C \$500, for which subscribers in Class A paid \$5 entrance fee and \$5 monthly dues every month; Class B \$10 entrance fee and \$5 monthly dues; and Class C \$7 entrance fee and \$2 monthly dues. Seventy per cent of the money received was kept as a redemption fund; ten per cent as an expense fund and twenty per cent was set apart for investment. The bonds were paid out of the redemption fund in numerical order. The Court of Appeals of the First District of Illinois held that there was nothing contrary to law in this scheme. The Court said: "The scheme applies the principles of joint tenancy to the investments by the subscribers, the survivorship depending upon default instead of death. It is the Tontine principle which Rapp applied in Harmony Society, which Gibson, C. J., speaking for the Supreme Court of Pennsylvania, said was 'prohibited neither by statute nor the common law.' *Schriber vs. Rapp*, 5 Watts, 351." In reference to the soundness of this decision it is enough to state that it is opposed to all the other cases and the case of *Schriber vs. Rapp*, 5 Watts, 351, cited by the court, does not support in the slightest degree the principle asserted.

Sec. 175. While none of these Bond Investment Schemes, involving the lottery principle, has been before the Supreme Court of the United States, that court held in the *Durland* case, 161 U. S. 35, that the scheme operated by the Provident Bond and Investment Company, of which *Durland* was president was a fraud within the meaning of section 5480, Revised Statutes, and the same court in *U. S. vs. Horner* cited with approval the English case of *Sykes vs. Beadon*, 11 Ch. Div. 170, which involved substantially the same principle, especially as to the prize feature.

VOTING CONTESTS, NOT LOTTERY SCHEMES.

Sec. 175a. The Postoffice Department held that a contest wherein a prize is offered to the most popular school teacher, the prettiest woman, the most popular farmer, etc.,

the party receiving the prize to be designated by votes cast by his friends, each vote to be paid for, is not a lottery scheme, though it is difficult to uphold such ruling upon principle. There can be no doubt that some of these contests involved the element of wagering or gambling, that is the promoters' object was to make money and not simply to ascertain who was the most popular teacher, farmer, etc. It is certain, as experience has shown, that as a money-maker, a contest of this character scarcely has a superior. It excites the participants to the highest degree and parties have been known to spend all the cash they had on hand and all they could borrow from their friends to buy votes for their favorites and the contests often end in accremonious bickering and complaints. But where the participants are present at the same place on the same occasion and the state of the voting is announced after each vote or where the contests are announced through newspapers and the state of the voting is given daily, it seems that each participant can control the result at his will. But where the state of the voting is not known during the contest there would seem to be an element of chance entering into the scheme because no participant in that case could know how much he would have to invest in order to win or when to stop voting.

Sec. 175b. The Illinois statute (R. S., ch. 128, sec 53) prohibited "every lottery, scheme or device of chance." In *Dion vs. St. John Baptist Society* (decided in 1890), 19 Atl. Rep. 825, it appeared that the Society offered a gold watch to the person who should receive the largest number of votes at a church, each vote to be paid for, and selected two candidates who should make the race. The Court of Appeals of Illinois held that the scheme was not a lottery, saying: "The article is not drawn by any ticket nor by any person; the only possible chance, if it can be called such, connected with the affair being whether one person's admirers or another's will give the most money to charity in order to obtain the prize for their favorite or friend, the affair usually arousing sentiment enough to render the game profitable. No contributor expects

to get any personal benefit from his contributions, nor can he, beyond a mere sentimental enjoyment, unless he immodestly or clandestinely votes (pays money) for himself as the plaintiff avers he did and that would be an imposition upon the decencies of the occasion. From the nature of the plan, no one would attempt to carry it on for any private gain. There could be no motive to sustain it for any such purpose. It is impossible that all persons engaged in such a scheme are guilty of gambling and liable to imprisonment for it."

LOTTERY SCHEMES. MISCELLANEOUS CASES.

Sec. 176. In *Jacobus vs. Hazlett*, 78 Ill. App. Rep. 29, the parties, differing as to the yield of wheat in a certain field, agreed that one of them should pay for the threshing of the whole crop and was to have all there was over 600 bushels which when threshed and measured turned out 874 bushels. Plaintiff brought suit for the recovery of 274 bushels of wheat being the excess over 600 bushels. This transaction was held to be a wager. The court said: "When the contract was made the number of bushels of wheat the field would yield was to the parties an unknown and uncertain event, upon which when ascertained, the one would lose and the other gain; since if the yield of the wheat when threshed and measured was enough more than 600 bushels to more than pay for the threshing of all of it, then the appellant would be the winner, if less the appellees would be the winners. This clearly brings the contract within the definition of a wager or bet, which is defined to be a contract by which two or more parties agree that certain sums of money or other things shall be paid or delivered to one of them on the happening or not happening of an uncertain event. *Bouvier's Law Dictionary*, 14th Ed., 647 and 648. It makes no difference, as to the right to recover in this case, that the parties clothed their bet or wager in the garb of an apparent contract for the sale of the 274 bushels of wheat, since it does appear that the effect of the real transaction was that appellant was to win if the field yielded more

than enough wheat, above 600 bushels, to pay for threshing all of it and the appellees were to lose in case the yield was less."

Sec. 177. In *Loiseau vs. State*, 22 South. Rep. 138, decided by the Supreme Court of Alabama, it appeared that several persons each dropped nickels into a slot machine, owned by defendant, agreeing among themselves that the one, after whose play the machine would indicate the highest card hand, should have all the cigars the nickels purchased. Defendant furnished from his stock a nickel cigar for each nickel put into the machine and delivered them to the person who obtained the best hand. The Court, holding the scheme to be a lottery, says: "That the parties were guilty of gambling and were within the general law of the state is not seriously controverted, but it is contended that the slot machine, as operated, was not a lottery and that the legislature had authority to license such gambling. We are unable to assent to this conclusion. Calling it by name a 'slot machine,' instead of a 'lottery machine,' does not vary its character; nor does the fact that the parties agreed that the winner should receive the value of the money in cigars instead of money itself exert any influence in determining the character of the winning chance to have been by lot. The three parties agreed between themselves—to which the defendant, the owner and the setter up of the machine, was a party—that the highest cards, to be determined by the revolving of a wheel, should win the value of all the money in cigars to be furnished by the defendant, be taking the money. There have been many definitions of 'lottery' by the decisions of the various courts, each generally made with reference to the particular case then under consideration; and, as soon as rendered, the ingenuity of the gambler has gone to work to invent some way to avoid the effect and compass of the precise words used in the particular case. There may be gaming which is not by lot but in every prohibited lottery there is an element of gambling. The constitutional provision is that 'The General Assembly shall have no power to authorize lotteries.' Lot has been defined to be 'a contrivance to determine a question by chance, or without the

action of man's choice or will.' * * * When small amounts are hazarded to gain large amounts and the result of winning is to be determined by the use of a contrivance of chance, in which neither choice nor skill can exert any effect, it is gambling by lot, or a prohibited lottery. * * * The legislature has no authority to authorize the licensing of a slot machine to be used as the evidence shows it was used in the present case. * * * Whatever may be the name or character of the machine or scheme, if, in its use, a consideration is paid and there is gambling, the hazarding of small amounts to win larger, the result of winning or losing to be determined by chance, in which neither the will nor skill of man can operate to influence the result, it is a determination by lot. * * * If there is anything to the contrary in *Buckalew vs. State*, 62 Ala. 334, it must be regarded as modified to conform to what is here declared."

Sec. 178. Where it appeared from the evidence that the accused maintained a slot machine so contrived that if one dropped a nickel in the slot therein he would either lose the nickel or win fifty cents and the object and purpose of the accused in maintaining the machine was to win money in this manner, he was held to be guilty of operating a lottery scheme. *Kohlshorn vs. The State*, 97 Ga. 343.

And it was also held in this case such a machine could not be treated as one kept "for amusement only."

Sec. 179. In *Buckalew vs. State*, 62 Ala. 334, it was held, that where money was put on a round table in equal amounts by several persons, each in turn whirling a hand, fastened in the center, the one, at whose whirl the hand registered the highest number on the rim of the board, taking all the money on the board, the promotor sometimes putting up money and sometimes charging a small sum for the use of the board to be paid by the winner, the scheme was not a lottery but gaming.

Sec. 180. In *People vs. Payne*, 3 Denio, 88, it was held that the object of the New York Statute then under review was to prevent gambling or gaming for some valuable thing;

and not to punish a lottery made or drawn for mere amusement, or the determination by lot of some matter involving no right of property.

Sec. 181. In *Chavannah vs. The State*, 49 Ala. 396, the defendant operated a wheel on which were numbers. He sold a dozen "paddles" on which were numbers to correspond with the numbers on the wheel. The conductor revolved the wheel and when it stopped, the number, at which a spring indicator (attached to the device) pointed, won ten times the amount paid for it, being the amount paid for all the "paddles" less twenty per cent, which went to the operator.

The Court said: "The transaction represented in the evidence is evidently a game of chance. The good or bad fortune of the party making the risk did not depend upon any skill of the player in control of the event which entitled him to win. That depended wholly on lot or chance. Lot is defined to be 'a contrivance to determine a question of chance without the action of man's choice or will.' When such a contrivance is applied to gaming where the chances are sold before the game is played, it is a lottery under our Criminal Code. Rev. Code, S. 3616; 2 Bish. Cr. L. S. 469; *Bell vs. The State*, 5 Sneed, 507. It is true that the manager did not determine the chance by putting his hand into a box or wheel and drawing out a prize or blank. * * * These 'paddles' which represented chances were sold to the player in lieu of lottery tickets as used in a regular lottery. When the wheel stopped the fixed index attached to the machine pointed to some number on the face of the wheel. If the number, thus shown by the index, corresponded with the same number on the paddle sold, the holder of the paddle won—if it did not he failed. Such a performance, when a small sum of money is ventured for the chance of obtaining a greater sum, is carrying on a lottery. * * * It may be somewhat non-descript and may not yet have received a name by which it can be definitely registered in the catalogue of games yet it has all the essentials of a lottery and it is forbidden by our statute."

Sec. 182. In *Com. vs. Wright*, 137 Mass. 250, it was

held that, where a party chose a number and paid a certain sum and the seller drew an envelope from a box full, containing a slip with numbers on it and if the number chosen was on the slip the buyer received a multiple of the sum paid, greater or less according to the agreement and if not, he lost what he had paid, was a lottery.

The Court said: "The event is none the less uncertain that the chances of the event are certain. The chances only represent the average of a long series of events. * * * The event does not appear to have been even mechanically certain, as the selecting of the envelope seems to have been made arbitrarily after payment. But if the choice of the number had also fixed the envelope, so long as the event could not be predicted by the party concerned, it would be uncertain and depend on chance in the only sense which the law has to take into account.

Perhaps it is a little more difficult to show how the game is more than a wager. A bet, however, is usually executory on both sides, isolated and determined by events independent of the action of the parties while in this game a price is paid for the chance of a prize and it is determined by a mechanical device worked by the manager of the game according to a scheme held out to the public whether he who pays the money is to have the prize or nothing. It may be that the difference between this and a single wager on the cast of a die is only one of degree; but, if so, the difference is sufficiently marked to warrant the finding of the jury. We can not say, as a matter of law that the fact that the prize was money and not specific and that more than one could select the same number with the same result prevented the game from being a lottery. It is a lottery according to the popular use of the word as shown by the dictionaries, according to history, to which lotteries with money prizes not specific have long been known, and according to the course of the decisions."

Sec. 183. Two parties met on Sunday and one of them said he believed he would raffle off his dwelling house and lot by chances, stating the chances to be 500 at a specified valu-

ation. The other party replied that he would take all the chances, and it was agreed that the deed should be made next day and they put up their watches as a forfeit to stand by the proposition as made and accepted. This was held not to be a lottery scheme in *Thornhill vs. O'Rear*, 31 L. R. A. 782; 108 Ala. 299.

Sec. 184. Where clubs of 40 persons each were formed by a merchant tailor for the disposition of suits of clothing, each of the stipulated value of \$40, by lot under nominal contracts of purchase, the price to be paid in weekly instalments of \$1 each, such payments entitling the holders of tickets to participate in weekly drawings by lot with a chance of receiving goods of the value of \$40 at any drawing without further additional payments than the weekly instalments paid, the scheme was held a lottery within the statute of Minnesota by the Supreme Court of that state, in *State vs. Moren*, 48 Minn. 555. A provision in the contract that each member of the club should eventually receive a suit of clothes when he should have paid \$40, if not previously drawn, or that he might withdraw at any time and receive "the value of money paid in on said contract in merchant-tailoring" does not make the scheme any the less a lottery or take it out of the operation of the statute. The sale of each ticket gave the purchaser a chance to obtain something more than he paid in. The Court held that this provision "would probably operate only as an additional incentive to purchase coupons in aid of the lottery scheme." The Court said: "They (the coupons) were not bought in order to get their face value in goods. The vicious element still inheres in the transaction. Patrons come into it with the hope and chance of winning a \$40 suit by lot for the price of a coupon. The sale of the ticket gave the purchaser the chance to obtain something more than he paid and that became an extra inducement for the purchaser. *U. S. vs. Olney*, 1 Abb. (U. S. 275; *Regina vs. Harris*, 10 Cox Crim. Cas. 352. The term 'lottery' has no technical meaning, but under the statute it must be construed in a popular sense and with the view to remedy the mischief intended to be prevented. The statute

is intended to reach all devices which are in the nature of lotteries, in whatever form presented; and the Courts will tolerate no evasions for the continuance of the mischief. It declares and defines a lottery to be a scheme for the distribution of property by chance among persons who have paid or agreed to pay a valuable consideration for the chance, whether called a 'lottery,' 'raffle,' or 'gift enterprise,' or by some other name."

Sec. 185. The Postoffice Department has gone farther than this case goes. It has held that a scheme of the character described in the *Moren* case is a lottery though each adventurer be required to pay his periodical dues after he draws his suit of clothes or other thing provided for by the scheme until the end of the stipulated period, on the ground that the benefits, which are determined by chance, are unequal. It is true that all the adventurers are required to pay the same amount and are to receive an article of the same kind and value but those who receive the article first have an advantage over the others, in two respects: 1, they have the use of the article first; and, 2, they may from one cause or another fail to pay their dues after they have drawn their prizes. It is true the advantage in drawing the article first is slight but that makes no difference, so far as the principle of a lottery is concerned; and this advantage must be regarded as valuable or the adventurers would not otherwise enter into any such a scheme.

Sec. 186. Defendant owned and operated a device consisting of a circular board, in the center of which was an arrow turning on a pivot, pointing to numbers around the edge of the board. Opposite each number was placed an article of jewelry or a sum of money in value from 5 cents to \$1. One having paid ten cents for the privilege of whirling the arrow was entitled to the prize opposite the number on which it stopped. Held a lottery. *Reeves vs. State*, Feb'y 9, 1895, Sup. Ct. Ala. 17 South. 104.

Cases cited: *Buckalew vs. State*, 62 Ala. 334; *Yellowstone Kit vs. State*, 88 Ala. 196, and *Bell vs. State*, 5 Sneed, 507.

Sec. 187. The scheme, operated in *Fleming and Nevill vs. Bills*, 3 Oregon, 286, was this: A box was divided into compartments numbered from 1 to 48, some of which contained prizes; others were empty or blank. The game was played by means of eight dice thrown by the person, who chose to pay the specified sum for the chance of winning. The person, throwing a number corresponding with a number of a compartment containing a prize, became entitled to the prize contained therein; otherwise he received nothing. *Fleming and Nevill* claimed that this scheme was not a lottery: First, because the person paying the money cast the lot; and second, a scheme or game is not a lottery unless all the ticket holders taken collectively have a certainty that some one or more of their number will gain the prize or prizes; and in support of these contentions they relied on the definition of a lottery given by Mr. Bishop, 2 Bishop Cr. L., sec. 496.

The Court overruled these contentions and held the scheme a lottery. The court quoted from the *American Cyclopaedia* as follows: "Two kinds of lottery may be distinguished, the Genoese or numerical and the Dutch or Class lottery" and then added: "This work describes the former as a scheme by which out of ninety consecutive numbers five are to be selected or drawn by lot. The players fixed upon certain numbers, wagering that one, two or more would be drawn among the five or that they would appear in a certain order." Of the Dutch or Class Lottery the author says: "In this species the number and value of the prizes are regularly estimated, all the ticket holders are interested at once in the play, and chance determines whether a prize or blank shall fall to a given number." The court then goes on to hold that it is not necessary in a lottery patterned after the Genoese System that there should be tickets or ticket holders, or that a given number of chances should be taken or that the holders of chances should have a certainty that a prize would be gained by one or more of their number, or that more than one at a time should bet or wager money or that the promoter should cast the lots.

Sec. 189. In *State vs. Grimes*, 52 N. W. Rep. 42, defendant was charged with keeping a gambling device called a "stock clock." This machine was constructed so as to be wound up. Cards, marked so as to represent certain kinds of railroad or other stock, were placed in it. The customer would invest a sum of money and name the stock he wanted to bet on. The machine was then set in motion and if the card with the stock selected by the customer marked on it came out, the customer won half as much as he had invested, otherwise he lost half as much as he had invested. "In short," remarked the Michigan Supreme Court, "the customer was betting on which way the clock would force a particular card and this depended entirely on chance. *Portis vs. State*, 27 Ark. 362." The Court further said: "The case of *State vs. Shaw*, 39 Minn. 153, 39 N. W. 305, relied on by counsel for the defendant, is not in point. While the lists and boards containing the names of horses that were to be run might furnish information to those who wished to gamble by betting on the races, yet they had nothing to do with determining the result. But, in this case, the element of chance depended upon the movements of the clock itself."

Sec. 190. The evidence in *United States vs. Politzer*, 59 Fed. Rep., showed that the defendant was agent for the sale of certain European Government premium bonds which were very much alike, and which included Austrian Government Bonds of 1860; Brunswick Bonds of 1868, 1869; Italian Red Cross Bonds of 1885; Bucharest Bonds of 1869 and Hungarian Red Cross of 1883. The circulars issued by defendant stated that drawings for the redemption of these bonds would take place at stated times and that certain prizes to be determined by drawings would be awarded to the holders of some of the bonds redeemed. Judge Morrow of the United States District Court for the Southern District of California, in December, 1893, in charging the jury in this case, held that all the above named bonds came within the principle laid down by the Supreme Court in the *Horner* case.

Sec. 191. The Horner case, 147 U. S. 449, is the leading authority in the United States on the subject of lotteries in general but more especially on the construction of the Anti-Lottery Acts of Congress. In that case Horner was indicted for advertising a lottery through the mails. The scheme he advertised was this: The Government of Austria, in 1864, issued bonds of one hundred gulden each, aggregating 40,000,000 gulden for the purpose of raising revenue for the Government in order to defray governmental expenses and carry on general state affairs and which were to be redeemed from revenues to be thereafter raised by taxation. The bonds were to be redeemed at the end of fifty-five years but the Government agreed to pay, in the meantime, during the first year as the minimum amount for any bond 135 gulden; during the second year 145 gulden; and so on increasing 5 gulden in amount in each year, until the minimum amount, to be paid on each bond redeemed, was 200 gulden. The plan of redemption of the bonds, prior to the maturity period of fifty-five years, was set forth on the back of each bond and by it each bond belonged to a distinct series the number of which was on the face of the bond, together with the number of the bond in that series. In order to determine what bonds should be paid and at what time and what amount was to be paid on each of them respectively, it stated on the backs of bonds that until April, 1874, there were to be five drawings a year, on certain dates; that thereafter, and until the end of the nineteenth year from the date of issue of the bonds four drawings a year were to take place at stated times; that thereafter to and including the thirty-first year three drawings a year were to take place and that thereafter to and including the fifty-fifth year after the date of the issue of the bonds two drawings a year were to take place.

Several controverted questions were raised in this case and disposed of by the court which may be summarized as follows:

First. Whoever purchased a bond at the same time purchased a chance in a lottery or similar enterprise, offering

prizes dependent upon lot or chance. In other words the money paid was a consideration for a chance for a prize as well as for a bond.

Second. That, according to the scheme, there was an element of certainty, that is the certainty that each investor would have returned to him what he paid in, with interest, which went hand in hand with an element of lot or chance, that is the chance of drawing one of the prizes offered and that the former did not destroy the existence or effect of the latter.

Third. That a so-called gift concert, as that term is used in the act of Congress, has in it also an element of certainty and an element of lot or chance and that the transaction embodied in the bonds in question was a similar enterprise to lotteries and gift concerts.

Fourth. A lottery, authorized by one Government, may be forbidden by another and although it was true that the Austrian Government bonds were vendible and ought to be treated as other articles of commerce, yet when these bonds were coupled with conditions and stipulations, which changed their character from simple Government bonds for the payment of a certain sum of money to a species of lottery ticket, which falls under the condemnation of our statutes, they should be classed as their conditions characterize them, and then they were not vendible, and to prohibit their sale did not violate any constitutional provision or treaty stipulation.

Fifth. The fact, that each investor would have returned to him all the money, that he paid, with interest, so that there could be no final loss, did not deprive the scheme of its evil tendency nor rob it of its lottery semblance and features.

Sixth. That the court is not justified in deciding a thing is not a lottery, simply because there can be no loss when there may be large contingent gains, simply because it lacks some element of a lottery according to some particular dictionary's definition of one, where it has all the other elements with all the pernicious tendencies which the Government is seeking to prevent.

These rulings of the court are in direct conflict with the opinion of the Court of Appeals of New York, in *Cohn vs. Koehler*, 96 N. Y. 362, and the opinion of the Supreme Court of California in *Ex parte Shobert*, 70 Cal. 632. The court seemed to think the Court of Appeals of New York was induced to hold that the bonds in question did not constitute a lottery scheme, because the Statute of New York, then under review, simply authorized the recovery of money invested in an *illegal* lottery, and as the bonds were authorized by law, they were not illegal.

The court cited, with approval, the American cases of the *Commonwealth vs. Chubb*, 5 Randolph, 715; *Dunn vs. The People*, 40 Ill. 465; *Thomas vs. The People*, 59 Ill. 160; *Chavannah vs. The People*, 49 Ala. 396; *Commonwealth vs. The Sheriff*, 10 Phila. Rep. 203; *Holman vs. State*, 2 Texas App. 610; *State vs. Lumsden*, 89 N. C. 572 and *Commonwealth vs. Wright*, 147 Mass. 250 and the English cases of *Reg. vs. Harris*, 10 Cox, C. C. 352; *Sykes vs. Beadon*, 11 Ch. D. 170 and *Taylor vs. Smetton*, 11 Q. B. D. 207.

LOTTERIES AND THE PUBLIC PRESS.

Sec. 192. The jealous pride of the American people in the freedom of the Press prevented for many years the insertion of any provision in the Anti-Lottery legislation of Congress prohibiting newspapers from publishing lottery notices. Under this legislation as it stood from 1872 to 1890 it was held by the Postoffice Department that a newspaper could not be excluded from the mails on the ground that it contained notices of lotteries drawn or to be drawn. But experience, having demonstrated that lottery schemes were extensively and persistently advertised through the Press to the detriment of the public and private morals of the people, the following sweeping provision was inserted in the Act of September 19, 1890; "nor shall any newspaper, circular, pamphlet or publication of any kind, containing any advertisement of any lottery or gift enterprise of any kind, offering prizes dependent upon lot or chance, or containing any lists of prizes at the drawing of any such lottery or gift enterprise, whether said list is any part or all of the drawing, be carried in the mail or be delivered by any postmaster or letter carrier." When the Postoffice Department undertook to enforce this provision there was great opposition raised by a certain class of newspapers and publications, based chiefly on the contention that the law was in violation of the provision of the Federal Constitution guaranteeing the freedom of speech and of the press, nor did this opposition cease until the Supreme Court of the United States definitely and conclusively held the Act constitutional in the Jackson, Horner and Rapier Cases. These cases left no room for further doubt or discussion and, with rare exceptions, the

Press of the whole country gave up the fight and has become a great bulwark of the law itself.

The law is very plain in its provisions. It includes "any newspaper, circular, pamphlet or publication of any kind." There could be and there has been no controversy about this provision. There has, though, been some controversy in regard to the clause which follows, "containing advertisements of any lottery or gift enterprise of any kind * * * or any lists of prizes at the drawing of any such lottery or gift enterprise, whether said list is any part or all of the drawing."

Sec. 193. When a scheme is advertised the first question presented for determination is whether it is a lottery, etc., or not. It has been found in practice, that the advertiser of a lottery scheme, especially when he gets good pay for it, is as much dissatisfied with an adverse ruling as the promoter and as many enterprises lie along the border land of doubt, this question has often been before the Department.

Lottery promoters sometimes couch the advertisement of their schemes in such general or ambiguous terms that it is vigorously insisted by the publisher that the law has not been violated. But the Department looks to the intent and not to the form of the advertisement. If it be plain that the object is to give notice of a lottery scheme or the drawing of prizes or where and how the promoter may be found and addressed, the paper containing the advertisement is excluded from the mails no matter how adroitly or ingeniously it may be constructed.

The press at first generally claimed the right to give the result of drawing of lotteries, as news items, without pay from the promoter or other person. But the result of a drawing, given as a news item in a newspaper, was found to be more pernicious than a regular advertisement and papers containing such items, whether paid for or not, were excluded from the mails. This point also has been yielded and this phase of the question is seldom presented for decision at this time.

Sec. 194. It should be observed that the law forbids the advertisement of the full list or part of the list of a lottery

drawing. This forbids the announcement by a newspaper of the drawing of a prize by any individual, whether it be drawn at a church raffle, or an avowed lottery like the Hondurans Lottery. To the publisher of a newspaper and especially of a country newspaper here is the greatest temptation. Some citizen, probably a well known citizen and personal friend of the owner of the publication, draws a prize in some regular lottery or at some charitable entertainment and the whole community would be interested to know the fact as a matter of current news, but the law forbids its publication and the publisher can not afford to give it in his columns and thus run the risk of having his paper denied carriage in the mails.

Sec. 195. Another and probably the most important question that has come before the Postoffice Department for decision in this connection is as to how far a newspaper publisher or pamphleteer may go in giving information in regard to a lottery scheme in order to cripple, injure or destroy it. Of course much care is required at this point for it has been found that the promoters of lottery schemes are often willing to pay and do pay large sums of money to newspapers to devote much space, not only in the advertising but also in the editorial columns, devoted to a denunciation of the schemes and of their promoters; but whenever it has been found that the publisher of a paper, circular or pamphlet was sincere in his opposition to lotteries and his denunciations were not paid for but were voluntary on his part and were intended by him to suppress the particular scheme involved, as well as lottery gambling in general, the paper or pamphlet has been allowed access to the mails though the public derived information from it in regard to the particular lottery and its promoters, which, under other conditions, would have made the publication non-mailable. In one case a lottery promoter published in pamphlet form the opinion of the Supreme Court, which contained the full details of his scheme and where and by whom operated but the Department promptly excluded the pamphlet from the

mails on the ground that its object was obviously to advertise the scheme, and not to cripple or destroy it.

Sec. 196. The Department has sometimes been in doubt as to what disposition to make of newspapers, circulars or pamphlets containing unauthorized advertisements of lotteries and lottery drawings when found in the mails. Subdivision 8 of section 31, P. L. and R. 1893, referring to newspapers, pamphlets and publications of all kinds, provides: "Postmasters should refuse to receive them from the publishers or to deliver them if by inadvertence they reach the office of destination. When found by postmasters in the mail in transit, they should be held until a report concerning them can be made to the Postmaster-General and instructions received from him as to the disposing of them."

Sec. 197. Ordinarily the Department, when, it finds a newspaper in the mails which concerns a lottery scheme, directs the postmaster to notify the publisher to take it out of the office and if it be not taken out after a reasonable time to destroy it and to destroy pamphlets and circulars without notice to anyone. The reason for this distinction in favor of a newspaper is that the notice of the lottery is simply incidental and may be cut out and the paper remailed to its patrons who have a property interest in it and besides this the notice may have been inserted inadvertently; while there can be no object in a lottery circular or pamphlet except to advertise the lottery and the expunging of the illegal matter would make the circular or pamphlet of no value and its remailing after being thus expurgated would not be desired. The newspaper is valuable without the lottery advertisement, while the circular and pamphlet are valuable only because of such advertisement.

CHAPTER IV.

SCHEMES OR ARTIFICES TO DEFRAUD.

Sec. 198. Congress, as early as 1827, prohibited postmasters from acting as lottery agents (4 Stat. L. 238, Sec. 6); and again in 1868 declared by statute (15 Stat. L. 194, Sec. 13), matter concerning lotteries nonmailable, but the first law forbidding transmission through the mails of correspondence concerning schemes to defraud was that of June 8, 1872. (17 Stat. L. 283).

Section 149 of the Act which was carried into the Revised Statutes as section 3894 is copied in section 6 of this work.

Section 301 of the Act of 1872, which was carried into the Revised Statutes as section 5480, was amended by the Act of March 2, 1889. (25 Stat. L. 873). The original section, with the language inserted by this amendment in brackets, is as follows:

"If any person having devised or intending to devise any scheme or artifice to defraud [or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence by what is commonly called the 'sawdust swindle,' or 'counterfeit money fraud,' or by dealing or pretending to

deal in what is commonly called 'green articles,' 'green coin,' 'bills,' 'paper goods,' 'spurious Treasury notes,' 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles], to be affected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the Postoffice Establishment of the United States, or by inciting such other person [or any person] to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place [or cause to be placed] any letter, packet [writing, circular, pamphlet, or advertisement] in any postoffice, branch postoffice, or street or hotel letter box] of the United States [to be sent or delivered by the said Postoffice Establishment], or shall take or receive any such therefrom, such person so misusing the Postoffice Establishment shall, upon conviction, be punished by a fine of not more than five hundred dollars or by imprisonment for not more than eighteen months, or by both such punishments (at the discretion of the court).

The indictment, information, or complaint may severally charge offenses to the number of three, when committed within the same six calendar months, but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the Postoffice Establishment enters as an instrument into such fraudulent scheme and device."

The balance of the Act of March 2, 1889, is as follows:

"That any person, who, in and for conducting, promoting, or carrying on, in any manner by means of the Postoffice Establishment of the United States, any scheme or device mentioned in the preceding section or any other unlawful business whatsoever, shall use or assume or request to be addressed by any fictitious, false, or assumed title, name, or address, or name other than his own proper name, or shall take or receive from any postoffice of the United States any letter, postal card, or packet, addressed to any such fictitious, false,

or assumed title, name, or, address, or name other than his own lawful and proper name, shall, upon conviction, be punished as provided in the first section of this act.

That the Postmaster-General may, upon evidence satisfactory to him that any person is using any fictitious, false, or assumed name, title, or address in conducting, promoting, or carrying on, or assisting therein, by means of the Postoffice Establishment of the United States, any business, scheme or device in violation of the provisions of this act, instruct any postmaster at any postoffice at which such letters, cards or packets, addressed to such fictitious, false, or assumed name or address may arrive, to notify the party claiming or receiving such letters, cards, or packets, to appear at the postoffice and be identified, and if the party so notified fail to appear and be identified, or if it shall satisfactorily appear that such letters, cards, or packets, are addressed to a fictitious, false, or assumed name or address, such letters, postal cards, or packages shall be forwarded to the Dead Letter Office as fictitious matter.

That all matter, the deposit of which in the mails is by this act made punishable, is hereby declared nonmailable; but nothing in this act shall be so construed as to authorize any person other than an employee of the Dead Letter Office, duly authorized thereto, to open any letter not addressed to himself.

That whenever the Postmaster-General is satisfied that letters or packets sent in the mails are addressed to places not the residence or business address of the persons for whom they are intended, to enable such persons to escape identification, he may direct postmasters to deliver such letters only from the postoffice upon identification of the persons addressed."

Sec. 199. Aside from the identification clause in the Act of March 2, 1889, very little practical work has been done or can be done to prevent a promoter of a fraudulent scheme from assuming a fictitious name to consummate his fraud, for it is so common for honest men to do business under a corporate or partnership name or a name other than their own that it is usually impracticable for the Postoffice Department to take

action against a party simply because he does not do business in his own name and the Department must look to the scheme itself to ascertain if it be fraudulent or not. If it be found to be legitimate the name under which it is operated is immaterial and if it be found to be a fraud then the promoter is denied the use of the mails, not so much because he uses a fictitious name, as because he is operating a scheme, which the Department finds is fraudulent. But under the Statute the Postmaster-General may, when he has reason to believe that a party is conducting a fraudulent scheme through the mails or is having his mail matter sent to a place not his residence, require the addressee to appear and identify himself as the proper party to receive the matter and in this way many swindlers have been caught and in many more cases the swindlers have failed to appear for identification and hence the matter addressed to them was destroyed or was sent to the Dead Letter Office and was there properly disposed of, according to its nature.

But in *Wilson vs. Pearson*, 13 Fed. Rep. 386, the court held that a postmaster is bound to give his reasons for believing that a fictitious address is being used to cover matter not allowed to be carried in the mails in order that the parties may meet the issues made.

The court said: "The postmaster is not authorized by the regulation to exercise an arbitrary judgment; he is only to require proof of identity when he has *reason* to believe that the mails are being used illegitimately. His judgment may be founded upon circumstances with which the owner of the letters has no connection, and unless some circumstances exist which call for the exercise of his judgment, his action is not within the protection of the regulation."

Sec. 200. There was some question at one time whether the amendment of section 5480 by the Act of 1889 changed the meaning of the original section so as to limit it to the cases enumerated in the latter act. This question has, however, been definitely and conclusively settled by the Supreme Court of the United States.

In *Streep vs. United States*, 160 U. S. 126, that court, construing this statute, said: "The Statute, in very words as well as in manifest intent, applies to any person who devises either a scheme to defraud or a scheme to sell counterfeit money or counterfeit obligations of the United States, provided the scheme is intended to be effected and is effected by communications through the mails."

And to the same effect is the decision in *U. S. vs. Sauer*, 88 Fed. Rep. 249.

Sec. 200a. In the enforcement of this statute the most important question that has arisen is as to the nature of "any scheme or artifice to defraud" as used therein. In the defense of certain schemes it has been contended before the Postoffice Department and before the courts that a scheme or artifice to defraud, to come within the terms of the Act, is nothing more nor less than the well known crime of obtaining money or property under false pretenses, which could be committed only by the misrepresentation of an existing or past fact and not by a false promise to do something in the future.

In meeting this contention the different phraseology in relation to this subject found in the various sections of the Act of 1872 should be noted. Section 149, (Ante Sec. 6), after forbidding the use of the mails to conduct a lottery scheme, proceeds to forbid their use for the operation of "schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses and section 300 which was carried in to the Revised Statutes, as sections 4041 and 3929, after authorizing the Postmaster-General to issue fraud orders against parties operating lottery schemes through the mails, provides for the issue of fraud orders against anyone found to be conducting "any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises," while sections 5480 uses the general words "any device or artifice to defraud." All these sections, being component parts of one and the same act, must be construed together and made to harmonize if possible.

In *U. S. vs. Sauer*, 88 Fed. Rep. 249, Judge Severens held that the words relative to fraudulent schemes in section 149 (3894, R. S.) embraced only schemes in the nature of a lottery. This may be doubted but it is a question of little importance in the practical administration of the law. It is clear that section 300 (sections 3929 and 4041, R. S.), relates to the fraudulent schemes interdicted by section 301 (section 5480, R. S.), as well as the lottery schemes mentioned in section 149 (section 3894, R. S.). It is manifest that the writer of these sections, as they appeared in the act of 1872, had no well defined conception of the offense which it was intended should not be conducted through the mails and that the same language has been retained in the subsequent acts because it was found in the sections of the original Act.

Conceding that Judge Severens is correct in his interpretation of section 149 (section 3894, R. S.), we have left sections 300 and, 301 (sections 5, 3929 and 4041, R. S.) which in their relation to fraudulent schemes must be reconciled if possible. The only way to do this is to construe the language of section 300 as defining what is meant in section 301 by the words "scheme or artifice to defraud." If that be true the definition of the offense would be "any scheme or artifice to defraud by means of false or fraudulent pretenses, representations or promises."

Taking all this legislation together it is apparent that Congress intended to strike principally at schemes devised to defraud the public in general. Section 5480 created a new offense and that was to devise a scheme or artifice to defraud to be effected through the Postoffice Establishment. By the express terms of the section the crime may consist in simply devising a scheme to defraud to be effected through the mails, and in the execution of the scheme depositing a letter in a post-office, without having reached the point of having made false or fraudulent representations or promises, the bare intent to defraud in the future by means of the scheme or artifice being sufficient. This has been the uniform construction put on these statutes by the Postmaster-General. January 4, 1883,

the Assistant Attorney-General for the Postoffice Department gave an opinion to the Hon. T. O. Howe, the then Postmaster-General in which he used this language: "In construing the statute, I have endeavored to observe the fundamental rule for the construction of statutes, by considering, first, the character of the evil sought to be suppressed, and second, the nature of the remedy sought to be applied, and herein the structure of the tribunal charged with the execution of the statute. First, then, as to the evil. What is meant by the phrase, 'or in conducting any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises?' Was it intended to include only what is technically a false pretense within the meaning of the criminal law?

I am clearly of the opinion that Congress did not use the term in this limited sense.

In the first place, in legislating for the Executive Departments, Congress is presumed to use words and terms in the sense in which they are understood by the public rather than in their technical sense.

In the second place, seemingly for the purpose of removing any doubt that might arise, the term 'false' is enlarged upon and explained by the correlative term 'fraudulent,' and the term 'pretense' is in like manner enlarged by the term 'representations or promises.'

So that the Postmaster-General is authorized to prohibit the use of the money-order or registry system to anyone engaged in obtaining money through the mails by means of false or fraudulent pretenses, false or fraudulent representations, or false or fraudulent promises.

In the view that I have taken the statute was designed to cover every conceivable form of fraud, where it is shown that the use of the mails constitutes an essential or important factor in the perpetration of such fraud.

Where it is shown that a party is carrying on a business through the mails which by reason of the worthless or trifling character of his goods he could not carry on if brought face

to face with his customers, it presents a case to my mind for the application of the statute.

I do not mean to say that in dealing with his customers through the mails a party may not puff his goods, in the sense in which that term is understood. What I do mean to say is that a party soliciting orders through the mails is, in view of this statute, (to say nothing of the ordinary obligations of honesty), bound to state at his peril practically and substantially what he proposes to sell. This description, too, must be addressed to the understanding of people to whom his solicitations are sent. Knowing, as the advertiser does, that the parties, whose patronage he solicits, are, by reason of their remote localities, unable to make personal examination of his goods, he is bound in law as well as in morals to send in response to their remittances just such goods as by advertisement he leads them to suppose they will get."

That is as clear a statement of the meaning of sections 3929, 4041 and 5480, as can be made.

Nine-tenths of the schemes the Postmaster-General finds to be fraudulent consist of the mere intention of the promoters not to carry out a promise in the future. It is true the Postmaster-General does not deny the use of the mails to anyone simply upon a supposition that he will not fulfill his promise in the future, but it is also true that he has no power to act under sections 3929 and 4041 in regard to frauds already perpetrated. When he finds a party, having devised a scheme to defraud, has defrauded some one, and is still advertising the same scheme, he denies the use of the mails to the party for the sole purpose of preventing the consummation of the fraud in the future.

This construction is also forfeited by the amendment of the act of March 2, 1889. It is not doubted that some thought, that, to make out a case under section 5480 as it originally stood, the promoter of the scheme must have intended to defraud the party with whom he dealt, and that as the vendor of counterfeit money informed his correspondent what he was to get, he would be guilty of no crime. Hence the amend-

ment. But in fact the amendment added nothing to the section because Judge Benedict, in 1882, in *United States vs. Jones* (10 Fed. Rep. 469), distinctly held that the selling of counterfeit money to a party, who knew what he was getting, for the purpose of putting it off as good money, constituted an offense under section 5480 as it then stood, notwithstanding the absence of evidence showing an intention to defraud any particular person. Judge Benedict said: "Any scheme, the necessary result of which be to defraud somebody would be a scheme to defraud within the meaning of section 5480." This ruling and this amendment point unerringly to the intent of Congress to prevent the use of the mails in the conduct of any scheme, which is devised to defraud generally, and of course there may be a conviction by simply showing an intent to defraud by a scheme to be effected through the mails and by the actual use of the mails in executing it, though no false promise has been made to any particular person and no one has in fact been deceived and defrauded. The mere *offering* of counterfeit money through the mails is sufficient, and it is also sufficient to constitute the crime to make any other offer through the mails with the intent to defraud somebody who may in the future be deceived by it.

Sec. 201. But the Supreme Court of the United States has fully answered the contention that this Statute covers only cases where there has been a misrepresentation of a past or existing fact and does not include false promises to do something in the future.

In *Durland vs. United States*, 161 U. S. 305, Durland was convicted of operating a so-called Bond Investment scheme through the mails as a scheme to defraud. The court said: "But the contention on his (defendant's) part is that the Statute reaches only such cases as, at common law, would come within the definitions of 'false pretenses,' in order to make out which there must be a misrepresentation as to some existing fact and not a mere promise as to the future. It is argued that there was no misrepresentation as to the existence or solvency of the corporation, the Provident Bond and Invest-

ment Company, or as to its mode of doing business, no suggestion that it failed to issue its bonds to any or every one advancing the required dues or that its promise of payment according to the conditions named in the bond was not a valid and binding promise. And then as counsel say in their brief, 'it (the indictment) discloses, on its face, absolutely nothing but an intention to violate a contract. If there be one principle of criminal law that is absolutely settled by an overwhelming avalanche of authority, it is that fraud, either in the civil courts or in the criminal courts, must be the misrepresentation of an existing or a past fact and can not consist of the mere intention not to carry out a contract in the future.' The question thus presented is one of vital importance and underlies both cases. We can not agree with the counsel. The Statute is broader than is claimed. Its letter shows this: 'Any scheme or artifice to defraud.' Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes or artifices to defraud. * * * But beyond the letter of the Statute is the evil sought to be remedied which is always significant in determining the meaning. It is common knowledge that nothing is more alluring than the expectation of securing large returns on small investments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes and even when the matter of chance is eliminated any scheme or plan, which holds out the prospect of receiving more than is parted with, appeals to the cupidity of all. In the light of this the Statute must be read, and so read it includes everything designed to defraud by representations as to the past or present or suggestions and promises as to the future. The significant fact is the intent and purpose. The question presented by this indictment to the jury was not as counsel insist whether the business scheme suggested in this bond was practical or not. If the testimony had shown that this Provident Company and the defendant, as its president, had entered in good faith upon that business, believing that out of the money received they could, by investment or otherwise, make enough

to justify the promised returns, no conviction could be sustained, no matter how visionary might seem the scheme. The charge is that in putting forth this scheme it was not the intent of defendant to make an honest effort for its success, but that he resorted to this form and pretense of a bond without a thought that he or the company would ever make good its promises. It was with the purpose of protecting the public against all such intentional efforts to despoil and prevent the postoffice from being used to carry them into effect that this Statute was passed; and it would strip it of its value to confine it to such cases as disclosed an actual misrepresentation as to some existing fact, and exclude those in which is only the allurements of a specious and glittering promise. This, which is the principle contention of counsel, must be overruled."

Sec. 202. The history of the administration of the law in the Postoffice Department shows that two classes of frauds are common. First, where the promoters do not intend to do anything toward the execution of their promises, such as a promise to send some article of value or to appoint agents at good salaries upon receipt of specified sums of money. Second, where the promoters so adroitly contrive their schemes as to make the public believe one thing will be done when the promoter intends to do another. One party, for instance, advertised that he would give employment to parties for "writing at home." When the victims sent their money they learned that the "writing at home" meant simply the writing of the letters they had already sent to the swindlers. Another used language calculated to make the public believe an article would be given free upon sending a small sum to pay for a periodical (devoted wholly to advertising fake concerns). This notice wound up by saying, "Send us the money and we will send you the paper and our offer." The money would be sent and the writer would receive the worthless paper and a printed slip headed, "Our offer," in which it was explained that upon receipt of the money for a club of subscribers, ranging from 5 to 50, the free article would be sent. Another party advertised a chinch-bug destroyer for \$5. When the

victim received the "destroyer" he found it to consist of two small paddles, and he was directed to catch the chinch bug, put it on one paddle, strike it with the other, and death would be instantaneous.

An enterprising man offered to send a fine steel engraving of Gen. Washington to anyone remitting to him a small sum of money. When he received the money he sent a postage stamp with Washington's engraving on it.

There are probably thousands of frauds of this character constantly advertised in our country by which the people are fleeced. The promoters of these schemes usually demand very small sums, so that the victims rather than be put to the trouble and expense of seeking redress in the courts ordinarily submit; and such schemes as these are the ones Congress intended to suppress, so far as the mails are concerned.

SCHEMES INVOLVING THE EXERCISE OF SUPERNATURAL POWER.

Sec. 203. As is well known there are many fakirs in the world who dupe people by taking advantage of popular superstitions or inducing a belief in their supernatural power. There is the fortune teller claiming to be the seventh daughter of a seventh daughter born with a veil over her face and because of such things to be endowed with power to look into the future and reveal its secrets.

Then there is the healer, who claims to possess the power to cure disease by a look or touch or through the means of some tangible object, which he has blessed and to which he has imported a healing potency. And again we find that the water witch or mineral witch, who claims to be able by supernatural or magnetic power to discover hidden streams of water or treasure. Some of these utilize this supposed power to make money, while others take what the public give them, claiming nothing as a right. It is a very delicate question how far the Government has the right to go in suppressing the business of these people through the mails.

Sec. 204. A party claiming to be a physician advertised that he had learned a secret through the spirit of Rameses, I,

by which he could cure certain diseases. In pursuance of the information, thus obtained, he prepared a disc about an inch and a quarter in diameter, which he sold for a dollar. He cautioned the purchasers not open it as it would thereby lose its efficacy, which had been imported to it by much meditation and loss of power on his part and he directed that the parties, using it, should place it over the heart, concentrate the mind on it and repeat slowly and solemnly the word "Tetragrammaton." Complaints were made to the Postoffice Department that this scheme was a fraud and its promoter was denied the use of the mails. The officials of the Postoffice Department dissected the disc and it was found to be made of a circular piece of paste board, with tin foil on each side and covered with chamois skin, the whole cost of material and work being about five cents.

Sec. 205. Another case of this class is *U. S. vs. Fay*, 83 Fed. Rep. 839. Fay pretended that he had some mysterious, superhuman power,, among other things, to penetrate, with mental reason into the bowels of the earth and discover the location there of supposed hidden treasures. He wrote to one Howard, advising him of his possession of these powers, which he represented to be higher than mortal and assuring him for \$50, he would positively find certain treasures supposed to be hidden away somewhere on Howard's farm. The money was paid, the treasures were not found and Fay was indicted in the U. S. District Court at St. Louis. That court held that was not a scheme to defraud under section 5480 R. S., U. S., on the ground that the scheme was visionary, irrational and stupid, and as not being calculated to deceive a rational being possessed of ordinary sagacity. The judge said: "There is a marked distinction between a case of this kind involving, as it does, a physical impossibility and one related to religious, moral or ethical tenets. A scheme to defraud, planting itself upon, and seeking to take advantage of such tenets entertained as they are by a large number of people, has been held to be within the contemplation of the

federal statutes and with this class of cases I have no fault to find."

Sec. 206. This ruling is in conflict with the spirit of the law as interpreted by other courts, by the Postoffice Department and by the Supreme Court of the United States. With all due deference to the opinion of the learned judge in this case it may be assumed as unquestionably the intent of Congress in this legislation to protect the unwary and simple from the fraudulent machinations of the crafty and unprincipled. As was stated by the promoter of a fraudulent scheme a few years ago to the postal authorities at Washington, it is not the wise, shrewd business men and women, whom these schemers hope or expect to fleece, but the unwary and foolish.

If the test made by the court in this case be applied to the facts in the Durland case the conclusion of the Supreme Court would have been the reverse of what it was. In that case Durland set forth his plan of operations with great precision and particularity and anyone, with ordinary business capacity, could have soon discovered, by investigation, that inevitable loss must come to a very large number of the investors in the scheme and yet the court held the scheme came within section 5480, because the jury had found Durland devised it to defraud and used the mails in conducting it. The court in the Fay case says that while the freedom of religious opinion and thought should bescrupulously maintained, yet a scheme to defraud, planting itself upon and taking advantage of religious tenets, should be held to come within the contemplation of the Federal Statute. Why? There are hundreds of millions of people in the world to-day who have opinions relative to the supernatural, that other hundreds of millions of people regard as visionary, irrational and stupid. If taking advantage of these opinions to perpetrate a fraud brings the scheme within the Statute, why should not taking advantage of the opinion, entertained by a large number of people and intelligent people too, that there are men who possess the supernatural power of locating water or treasure hidden beneath the earth's surface? These men are known among the people as water or

treasure witches. To the ordinary mind such a power seems visionary and even stupid but to the person who has faith in it, it is a reality—a verity.

Not long since an old negro was swindled out of \$4,000, money he had earned by hard labor and a life of frugality, because he had implicit faith in this power. A schemer told him that some Indian traders, at the beginning of the present century, had buried \$250,000 in silver on his land and that it could be found by putting some dirt, taken from the grave of one of the traders, into a vessel and carrying the vessel over the land; that when the party carrying the vessel came to the spot where the treasure was hid, the dirt in the vessel would move. The negro, who was regarded as a good business man, though without education, put up \$4,000 against the advice of a banker in the neighborhood to carry out this scheme, which involved an impossibility as it presented itself to the ordinary man. The negro related the facts of the case, after he discovered that his money was lost, to his attorney and when asked if he believed the story told by the swindler he replied that he did. Should that negro not be protected simply because he had faith in an impossibility? Was he insane on this point? If so he was clearly entitled to the protection of the law. Whether sane or insane the taking of his hard earned money by an appeal to his superstition or whatever it may be called was a hideous crime that deserved not only the severest punishment but the execration of mankind.

In the Fay case Howard no doubt believed what Fay told him as simplicity as the negro believed the nameless swindler. To the judge of the United States Court for the Eastern District for Missouri Fay's claimed power appeared visionary, irrational and stupid but Howard probably thought it was a veritable reality. Indeed it must have been a reality to him or he would not have put up any money to test it.

In determining whether a scheme comes within this Statute or not the question is not what the intended dupe ought to believe but what he does in fact believe. The question is

simply whether the party has devised a scheme or artifice to defraud and has used the mails to carry it out. Nor does it make any difference that the scheme presented may appear visionary or impossible to many or a large majority of people. As stated by the judge himself in the Fay case when a scheme is carried out by the swindler by taking advantage of a religious opinion entertained by his intended dupe, it should be held to come within the Federal Statute. And this is the effect of the decision in *United States vs. Reed*, 42 Fed. Rep. 134.

Sec. 207. There the defendant, advertised that, by an unknown power, he was able to answer sealed letters addressed to spirit friends. He directed his would-be-customers to write the full name or names of their spirit friends on slips of paper—to address them by terms of relationship or friendship—to ask questions which it was desired should be answered, to sign their own full names and place the slips in envelopes and seal them and then place these in larger envelopes directed to the party advertising the scheme. He claimed he could obtain answers to the questions without opening the inner letters. His charge for each answer was one dollar, which he proposed to return if no answer could be obtained which he admitted was sometimes the case.

Numerous statements of the promoter of the scheme were shown tending to prove that sometime previous to his trial he acquired a knowledge of the trick of opening sealed letters by an exchange of tricks with another party. He offered to show that in particular instances he had satisfactorily answered sealed letters and that the questions answered were of such a character that he could not have answered them except by supernatural power. This testimony was excluded. He also asked the privilege of giving an exhibition or test of his power in open court. This was also denied. Judge Severens, charging the jury, said: "The defendant, in this case, founds his defense upon the claim, as urged by his counsel, that this was not a scheme to defraud. The question of fact is upon the first head what was the intention or more precisely what was the belief of the defendant as to his capacity or power to get

answers to questions contained in sealed letters from the spirits of the departed? Now, gentlemen, every man has an absolute right to believe what he will. It is a phase of religious privilege which is guaranteed by the fundamental law of the land to every citizen. This right of belief and the right of association for its promulgation is complete and the party, holding any belief may engage in any practice founded upon it unless he, thereby, injures the peace and welfare of the public. A man may not carry his belief into conduct which is injurious to the public and contrary to law. This is a distinction of great importance in view of the guaranty of religious freedom and of opinion in all matters of belief which is guaranteed by the constitutions of the several states and in large measure by the Constitution of the United States. It is the difference between belief and action, of opinion and conduct in practical matters. If a man carries his belief into a practice or a business involving a fraud and known to him to be such, he is liable to be dealt with by the law; and if he also uses the mails to promote such business he is liable to indictment and punishment in the Courts of the United States. The interests of society require that every man's conduct should conform to the law; and while it protects him in his freedom of opinion and belief in all religious and spiritual matters, it will not permit him, under the guise of that belief, to do a thing which the laws of the country condemn. To permit this (to employ the language of the Supreme Court of the United States in dealing with an analogous question) would be to make the professed doctrines of religious belief superior to the laws of the land, and, in effect, to permit every citizen to become a law unto himself. There could be no improvement under such circumstances and it could not be tolerated. Upon the question of an intent to devise a scheme to defraud the rule is this: If the scheme be adapted in its plan to work a fraud upon others and the defendant knew that a material representation therein contained and calculated to deceive was not true or if he did not believe it was true, then the intent is made out. So that the material question here is, did the defendant

devise his scheme of business in good faith? Did he believe that he could obtain answers to sealed letters from the spirits of the departed relatives and friends of the inquirers? * * * You must not abandon the search of truth upon the suggestion that the elements of inquiry are not open to your pursuit, if your reason seems to you sufficient to see the facts. In other words, you are not to disregard or fail to give effect to your own convictions upon the testimony about the facts by reason of a cloud of mysteries which you can not penetrate. For the purpose of administering the law you must adhere to what is practical and solve all questions by the best practical means at hand. No man has a right to embark in a business and insist that the legality of it shall be tested by principles beyond the understanding of others and not by the apprehension of the courts and juries of the country, if when tried and tested by common human understanding the purpose is found mischievous and unlawful. In order to convict this respondent you must find from the evidence, beyond a reasonable doubt, that he did not believe that he could do what he pretended he could do. * * * If he acted in good faith then there was nothing criminal in what he did; because the law looks, in determining this question of fraud, to the intent with which the act, charged to have been done, was done. * * * If this was a scheme gotten up by him without any belief on his part that he could get answers to sealed letters from the spirits of the dead and, if without regard to the question of his ability to do this, he devised this scheme for the purpose of imposing upon and gulling the public and getting money through that means, it was a fraud and should be denounced as such. If, on the other hand, he honestly believed he could do this which he advertised he could do then there is no fraud."

The jury, having found the defendant guilty, a motion for new trial was subsequently argued before the District Judge, the Circuit Judge also sitting, and, after full argument, was overruled.

The court here not only recognizes the fact that there is a popular belief in supernatural power but also holds an accused

party guiltless, if he honestly believes he possesses such power. The power to obtain answers to letters under seal, without opening them, seems as visionary, irrational, stupid and even impossible as the power to discover hidden wealth. But Fay was discharged not because he honestly believed he possessed supernatural power but because his dupe ought to have known that he did not possess it.

The Postoffice Department, following the principle laid down in the Reid case, has denied the use of the mails to fortune tellers and others operating similar schemes .

BUCKET SHOPS.

Sec. 208. Operators, holding themselves out ostensibly to the public as commission merchants, but in fact conducting what is known as a "Bucket Shop" business have been held by the Postoffice Department to come within the embrace of section 5480. So also have those who conduct a pooling or syndicate scheme in the speculative market. The fraud in this class of cases consists in the fact that the operators can convert to their own use all the money they receive for investment without making any record showing what disposition they make of the funds, whereas the investors suppose such a record is kept from the announcement that the operators are doing business as commission merchants. Many of these operators appear before the Postoffice Department in defense of their schemes and they uniformly admit that a "Bucket Shop" or Pool or Syndicate Sale is fraudulent *per se*.

As one of the thousand examples the following may be cited from a report made by a special agent or inspector of mails. Advertisements were made and circulars sent out in a firm name that assumed to conduct its business upon legitimate principles, not depending upon chance but upon accumulated capital, invested under the advice and superintendence of men of experience, judgment, and integrity in the actual purchase of stocks in Wall Street, holding the stocks until a considerable advance was secured, when they were closed out

and profits, less a moderate commission paid to the agents who effected the purchase and sale, were divided among the persons advancing the money. This pamphlet, advertisement and circular often bringing a remittance, and using part of this amount as a bait, they returned to the sender with a circular, of which the following is a specimen:

"Dear Sir: We take pleasure in informing you that we made a turn in Northwestern preferred stock, selling short at 65 7-8, and covering at 65, realizing a profit of 7-8 per cent, being equivalent to \$87.50 profit on each 100 shares of stock.

N. B. The profits and original capital to be used as working capital until the close."

That this bait generally drew more money from the unsuspecting and innocent speculators is evidenced from the number of the letters received at the Postoffice Department, procured from the swindlers by its special agent.

Following this kind of circular came one not so encouraging, as follows:

"Dear Sir: We regret to have to inform you that, owing to the terrible fluctuations in the stock market during the week and the great demands upon us for money, together with an unusual stringency of the money market, we have been forced to close out all the stock we have been carrying with our own capital, and have had to do so at a great loss to ourselves. Feeling that we have done all that we could, even to inflicting additional losses upon ourselves, we can only hope to retrieve our losses, as well as to help you to recover your losses, by new ventures, where, with a brighter outlook in the stock market and renewed efforts, our losses may soon be forgotten in the large gains."

Or perhaps something like the following:

"Dear Sir: We regret to inform you that we made a very unlucky turn with the combination in which you were interested, buying St. Paul common at 30 3-4, when the stock declined very rapidly, with the entire capital of one per cent. margin, and other profits that we have already accumulated were entirely exhausted. We regret exceedingly that this

venture was unsuccessful. However, if you take another venture we will do all in our power to make it a success, and retrieve these losses."

By this time however, the recipient of the circular saw only too clearly the swindle which was being perpetrated, and, gaining experience from his depleted pocketbook, doubtless resolved to speculate no more in stock.

It is hardly necessary to state that none of these pretended firms ever spent one dollar in stock buying, or even pretended, beyond the wording of their circulars, to make the transaction alluded to. From the first to last the affair was a swindle.

Sec. 209. A "Bucket Shop" scheme come before the court in *U. S. vs. Loring*, 91 Fed. Rep. 881.

Fleming and Loring were indicted in the District Court of the United States for the Northern District of Illinois, charging that they, pretending to be commission merchants at Chicago and the managers of an association and a fund under the designation of Fleming and Meriam's "Fund W," for speculating in grain, provisions and stock, had devised a scheme and artifice to induce divers other persons to send them money for investment in said fund, but they intended in fact to convert the money so received to their own use and thus to defraud the persons who should send them money and that they intended to conduct and they did conduct this scheme through the mails. Judge Blodgett, before whom the case was tried, in his charge to the jury, among other things, said: "The object of this Statute was to prevent the use of the Postoffice Establishment for fraudulent purposes. The postal system may well be considered as one of the most useful devices of our modern civilization, organized and supported at public expense. It furnishes so cheap, expeditious and certain a method of communication between persons in different parts of the country and by means of postal treaties in foreign countries, that the temptation to use it for the promotion of fraudulent schemes is very great. And hence, Congress has deemed it wise to enact the Statute I have just read in order, if possible, to prevent what is intended to be and is

one of the beneficent agencies of the age from being converted by bad men into an instrumentality for the perpetration of crime. * * * It is not necessary in order to make out a case under the law that the defendant shall be the inventor or originator of the scheme. * * * If a man adopts some old scheme which another devised, and acts upon it, he has made it his own for the purposes of the act. * * * The gist of the fraud charged * * * is the purpose of the defendants to convert to their own use the moneys which they should induce and procure other persons to send them to be used as a part of the alleged 'Fund W' in speculating in grain, provisions and stocks. * * * If the proof satisfies you that this 'Fund W' has been lost in dealing in good faith in grain, provisions and stocks then the allegations as to the fraudulent character of this 'Fund W' scheme are not sustained. * * * The question is, did they deal in grain, stocks and provisions in good faith for the benefit of the shareholders and has the money in question been lost in that way. This you must decide by the evidence in the case and that this is the turning point or pivotal point in this case, you must already have seen. There is proof in this case as to the methods of dealing on those exchanges where it is claimed that most, if not all, this money was lost. You will see from what the proof discloses in regard to the methods of these concerns that there is to say the least ample opportunity in their methods for making up a fictitious or fraudulent account, if it is desirable for the purposes of the exchange or any of its customers to show a loss. No regular books of transactions are kept, but the transactions are kept on sheets as they are called. But, aside from this, you can see that by those methods the managers of the affair, Fleming and Mariam, if they wished an apparent transaction, could readily put themselves on the wrong side of the market at any moment and purposely sink or apparently sink a very large sum in margins at any time. It is also true that the defendants, as managers of these funds, could only realize for themselves the benefits of these losses by some collusive arrangement with the man-

agers of the exchange. And you are to say from the proof, from the relations which the testimony discloses between these parties, the intimacy which existed between all or some of them, whether there was or was not such relation between them as renders it not only probable but certain, beyond reasonable doubt, that this money was lost by arrangement between the managers of the fund, the defendants, and the managers of those exchanges (the Public Produce, Grain and Stock Exchange and the Metropolitan Grain and Stock Exchange of Chicago). But, if the proof satisfies you that the money was so apparently lost for the mere purpose of making up a record or show of losses and went into the hands of the proprietors of these exchanges in order that the managers of the fund could realize some direct or indirect benefit from it, then you will be justified in finding the allegation of fraud in the indictment sustained." The defendants were convicted.

FRAUDS; THE C. O. D. BUSINESS.

Sec. 210. A scheme, known as the "C. O. D. business," has been extensively adopted in late years for the sale of medicine for weak men. The promoters advertise in a fictitious name or the name of some person, interested in the scheme, to the effect that such fictitious person or other person has been cured of a private disease by using a certain medicine, prepared and for sale by the promoter and will send a free prescription to anyone, afflicted with such disease, who will write for it. The dupe writes to the party, whose name is signed to the advertisement, supposing he is addressing a real, disinterested person. The letter written, however, is not seen by the addressee but goes directly into the hands of the promoter. The promoter has the prescription prepared in lithographic form and stamps across its face the words "for weak men" so as to deter the recipients from having it filled at the local drug stores. This prescription is sent, accompanied by a letter stating that the promoter, feeling confident his medicine is a sure cure for the disease, has taken the liberty to send

C. O. D. a package of the medicine, at a cost of \$3.00. If the dupe refuses to take the package out of the express office he is notified by the promoter that he can have the medicine by paying one dollar and if he still refuses the express agent is directed to destroy the package, thus proving conclusively that the stuff is not worth the cost of returning it.

This method of doing business is not resorted to to sell any article except *medicine for the cure of private diseases*. The reason for this is apparent. It would not work in the sale of anything else and the promoters bank on the fact that the most of men, afflicted with private diseases, will take the packages out of the express office and pay for them rather than make any objection for fear it would lead to an inquiry into their condition. This scheme has been worked of late years so successfully that many, engaging in it, have made large fortunes and it has become so disreputable to advertise it that parties advertising other patent medicine remedies take the pains to state that they are not engaged in any "C. O. D. swindle."

The Postoffice Department denied the use of the mails in the conduct of this scheme.

FRAUDS; COLLECTION AGENCIES.

Sec. 211. Certain agencies a few years ago adopted the following method to collect claims alleged to be due newspaper publishers: On their letter-heads they would print what became known as "Newspaper Laws," the substance of which was that a subscriber could not stop the paper until he paid all arrearages; that a refusal to take the paper out of the office or leaving it uncalled for was *prima facie* evidence of intentional fraud; that the postal laws were such that a publisher could arrest anyone for fraud, who took a paper out of the office and refused to pay for it; and under the same laws the man who allowed "his subscription to run along for some time, unpaid, and then ordered it discontinued or ordered the postmaster to mark it refused, and had a postal card sent so notifying the publisher, was guilty of obtaining money under false

pretenses, laying himself liable to arrest and fine, the same as for theft." No such laws as these existed and complaints were made to the Postoffice Department that the agencies attempted in many cases to coerce the payment of unjust claims by threatening to enforce the laws they thus printed on their letter-heads. These agencies insisted that every man was presumed to know the law and that a false pretense as to what the law is does not come within the terms of section 5480. But they were not able to make a satisfactory reply when asked what their object was in printing such so-called laws so conspicuously in their correspondence if no one was in fact misled and deceived by them. The truth is thousands did believe that the laws, thus promulgated, did exist and many unjust claims were paid because the alleged debtors feared to come within reach of Uncle Sam's strong arm. It is a well known fact that most people have a mortal dread of getting into the Federal Courts.

The Department denied the use of the mails to these agencies, holding that an attempt to collect an unjust claim by a threat to enforce a penal law they knew had no existence came within the contemplation of the Statute.

It may be remarked, *en passant*, that the newspaper business is *sui generis*. If all publishers would send their papers to subscribers only and then would promptly discontinue them, when the time of subscription is out but little difficulty would intervene. But, as is well known, many publishers send their papers to persons who have not subscribed for them and in that case the recipients suppose the papers are sent as a compliment to them and hence take them out of the post-office and read them and in other cases the publishers, having obtained subscriptions for a limited time, continue sending their papers for years after the expiration of the subscription time and recipients are expected by the publishers to pay and often do pay large bills for papers they do not want. So peculiar is the contract between the publishers and subscribers of a newspaper that collection agencies have made no attempt to coerce payment of any bill except one for a newspaper by

the publication of a penal law and the threat to enforce a law that has no existence.

FRAUDS: MISCELLANEOUS CASES.

Sec. 212. A promoter advertised that he would give a prize of twenty dollars to the party who would correctly fill up four skeleton words given in an advertisement of the scheme which was called "The flag signal guessing contest." The promoter informed the public that on receipt of the answers he would send to the competitors one of his circular advertisements on which were stamped flags of four different colors; one color representing that one word had been correctly filled; one color representing that two words had been correctly filled and so on, the fourth representing that all four words were correct. Upon receipt of their "flag signals," as they were called, the competitors were required to send the promoter a certain amount of money, before their names could be considered in the awarding of the prize. The contest was so simple that all competitors made four correct words and received the "flag signal," indicating that they had filled all the words correctly. Complaint was made to the Postoffice Department that this scheme was a fraud and the promoter was asked to explain his methods which he readily did. He informed the Department that there were thirty-six words that could be made, using the skeleton words given as a basis and upon a careful reading of the advertisement it was found that it was so adroitly constructed that it might be construed to mean that the prize should go to the person only who made all the possible words out of the skeleton words, though to the ordinary reader it meant simply that the party giving four correct words would get the prize. That that was the apparent meaning of the advertisement clearly appeared when the promoter informed the Department that only one out of thousands of competitors had construed it the other way. The scheme was held a fraud under section 5480, Revised Statutes, because it was devised to deceive and did deceive and mislead the public. A widow woman was so sure she would get the

prize when she received the "flag signal," representing she had made four correct words that she went to a store in the town where she resided and bought goods to the amount of twenty dollars on the faith of it and another had promised to pay the interest on a mortgage on her house when she received this prize money.

Sec. 213. *U. S. vs. Wooten*, 27 Fed. Rep. 702, is a case where the parties were charged with a conspiracy to obtain goods without any intention of paying for them.

Sec. 214. The sending through the mail of a letter calculated to induce the purchase of counterfeit money at a low price for the purpose of circulating it constitutes an offense under section 5480, Revised Statutes, although there is no evidence of an intention to defraud any particular person.

U. S. vs. Jones, 10 Fed. Rep. 469. Judge Benedict said, in that case, that "any scheme, the necessary result of which was to defraud somebody, is a scheme to defraud within the meaning of section 5480."

Sec. 215. A case came before the Postoffice Department in 1897 which is instructive.

A party used a firm's name and the name of a publishing company in doing business in procuring and selling patents. He was charged with a violation of section 5480 and after an exhaustive hearing the Assistant Attorney-General for the Postoffice Department (Gen. Tyner) found the facts to be that the accused used the mails in transmitting to the public his advertisements and alluring circulars and letters inviting inventors to submit inventions to him for preliminary searches and reports as to their patentability; that he made evasive and false reports thereon; that their correspondents, relying upon said false and deceptive reports, and trusting in their competency, honor and honesty, were induced to remit money to him to pay the necessary expenses of drawings for their devices, the preparation of applications for patents thereon, the first office fees and the attorney fees required by the accused; that even when the application was rejected and the patent thereon refused, he withheld the fact from the applicant, or communi-

cated it to him in such a misleading way as to conceal from him the indisputable fact, that all of value in his invention had been anticipated, coupled with the offer to proceed, upon the remittance of a sum required by him to pay the additional cost and fees, with an appeal from the rejection by the examiner to the board of examiners in chief, well knowing that no appeal could be sustained, and failing to even appear before said board and present the reasons for the appeal; then he followed up the deceit and fraudulent representations by suggesting that a valuable foreign patent could be secured on his patent, knowing the representation to be false and fraudulent. Furthermore, by seductive and alluring assurances that his invention, after being patented (although the patent might cover claims so narrow or be based on devices so useless as to be worthless), would be worth a large sum of money as an article of sale, generally, if not invariably, naming an estimate of from \$2,000 to \$20,000 and by offering, upon the payment of \$20 in advance and the promise of commissions to be realized from a subsequent sale, to advertise the invention extensively in the metropolitan newspapers to dispose of the patent, presumably at the figures of their estimate, he secured large sums of money.

Tempting promises to the inventor of being placed, under certain conditions involving the payment of money, on "The Roll of Honor," prizes of \$150 each for the best "idea" concerning new inventions, and of being presented with a handsome (?) prize medal (containing from 20 to 25 cents' worth of silver), were mingled with and interspersed through his circulars and letters; the whole specious scheme being crowned with the offer to "write up" the fortunate inventor and to reproduce his photograph conspicuously in the columns of the paper he published.

In the distribution of the prizes he offered for the best idea in regard to inventions he selected, as judges, senators and representatives in Congress and other public men of prominence and influence and the awards with the names of the

judges were published all over the country by which he acquired an enormous and enviable prestige as patent solicitor.

In giving an opinion to the Postmaster-General in this case the Assistant Attorney-General for the Postoffice Department said:

"To induce a person, by expressions of opinion, to believe and upon such belief to expend money, that he has a device which, if patented, will be very profitable to him, which expressions any patent attorney of reasonable ability would know are not correct and never can be; by stating that a device is certainly of a patentable nature which, while technically true, is intended to convey the impression that a patent can be obtained therefor; by asserting that every device submitted is a very ingenious and valuable one, which reckless assertion is a mere matter of form; by placing ridiculous values on devices presented; by reporting so-called unfavorable searches in an intentionally evasive and indirect manner, and awarding medals for special merit for *every* device reported favorably, certainly amounts, if anything does, to obtaining money by means of false and fraudulent representations, pretenses, and promises."

Sec. 216. In *U. S. vs. Mitchell et al.*, 36 Fed. Rep. 492, it appeared that Mitchell, being the holder of a certificate of membership in an insurance company, received an assessment notice, in writing, requiring him to pay to the company three dollars on or before April 19, 1889, in default of which payment his right to future indemnity would be lost. He failed to comply with this notice and subsequently set up a claim for indemnity for an alleged accident occurring shortly after April 19, 1887, and in furtherance of this claim inclosed the aforesaid assessment notice with \$3 in an envelope addressed to the company. This letter was mailed April 27, 1887, but in order to deceive the officers of the company, the defendants changed the date of mailing from April 27 to April 15, one of the defendants being an employee of the postoffice where the letter was mailed.

Judge Acheson held that these facts did not bring the case within the provisions of section 5480. He seems to have rested his decision on the ground that the use of the mails was not a part of the original scheme to defraud. He said: "A careful study of the language employed has convinced me that it was not intended that this section should embrace every case where a letter promoted or connected with a fraudulent design may be sent through the postoffice by the person engaged in or contemplating the fraud. As was said in *Brand vs. U. S.*, 4 Fed. Rep. 395, the scheme to defraud within the meaning of said section is one which is to be affected by the deviser of it opening a correspondence by mail or by inciting some one else to open such correspondence with him. To constitute the statutory offense something more is necessary than the mere sending through the mail of a letter forming part or designed to aid in the perpetration of a fraud. * * * It will be perceived that the statutory offense is complete when the letter is placed in the postoffice. But in the case in hand the fraudulent act was committed after the letter had been placed in the postoffice and consisted in the misuse of the mailing stamp whereby a false date was given to the post mark."

The learned judge here seems to have overlooked the fact that the design to change the post mark of the letter might have been formed and probably was formed at the time and before depositing the letter in the postoffice; and in that case he would have been guilty under section 5480 which makes it crime to devise a scheme to defraud coupled with an intention to use and afterwards using the mails in consummating it.

Sec. 217. In *U. S. vs. Owens*, 17 Fed. Rep. 72, Judge Treat held that an attempt to defraud a creditor by inclosing with a letter to him worthless slips of paper in place of money stated by such letter to be inclosed therewith and sending such letter and inclosed slips to the creditor through the mail is not an indictable offense under section 5480. The judge said: "It is obvious that the fraudulent scheme could not be effective. The debt would not be discharged by the receipt of worthless slips of paper nor even by the giving of a receipt ob-

tained by fraud. * * * No one was defrauded and no one could possibly be. * * * Were the postal laws designed to draw within Federal jurisdiction each and every individual transaction between debtor and creditor, irrespective of the possibilities of effecting a fraud if any were intended? * * * If such is the scope of the section named, it may draw within Federal cognizance nearly all the commercial correspondence of the country as to disputed demands and the value of remittances. It appears to the court, that the act was designed to strike at common schemes of fraud, whereby, through the postoffice, circulars, etc., are distributed generally to entrap the unwary and not the supervision of commercial correspondence solely between debtor and creditor."

Sec. 218. The defendant in *U. S. vs. Haynes*, 29 Fed. Rep. 691, under the name of Lyons Silk Company, circulated through the mails an advertisement, stating that to close out remnants he would send by mail, post paid, pieces of silk, all of one color or assorted, suitable for making and repairing dresses and other garments, 6 pieces for 35 cents, 12 for 60 cents and 24 for one dollar, none less than seven-eighths of a yard in length. In answer to the advertisement he received through the mail letters inclosing money from persons who supposed they were to receive in return pieces of silk cloth, but the defendant sent them, instead, pieces of silk sewing thread. Other transactions of a similar character were also shown. The defendant was found guilty.

Sec. 219. In *U. S. vs. Haeffinger*, 33 Fed. Rep. 469, it was held that where an indictment charged that the defendant had devised a scheme to defraud by falsely pretending in and through certain letters to be seeking information that would show and lead the persons to whom the letters were addressed to believe that they were heirs to large fortunes in England and requesting the remittance of a sum of money by said persons to him with the intent to retain the money so inclosed, it was not necessary to charge further that the state-

ments in the letter were false. Judge Thayer said: "The offense described in the indictment consists in placing a letter in the mails in execution of a fraudulent scheme previously devised which is intended to be carried out through the agency of the Postoffice Establishment. It is not essential that the letter written in aid of the scheme shall contain certain statements. * * * The important question is whether a fraudulent scheme was concocted of the nature described in the indictment and whether the letter in question was mailed in furtherance of that scheme."

Sec. 220. In *Stokes vs. U. S.*, 15 Sup. Ct. Rep. 618, the defendants were convicted of a conspiracy to commit the offense described in section 5480, Revised Statutes, of using the Postoffice Establishment for fraudulent purposes. The artifice described was one wherein each of the defendants represented himself as a dealer in various kinds of merchandise, certifying each other to be financially responsible and ordering merchandise from various parties, having no intention of paying for the same; on appeal to the Supreme Court of the United States the conviction was sustained.

The court held that where letters were written by the defendants and found their way into the mails the jury could be authorized to infer that they were deposited in the mail by defendants.

The court held that the following matters must be alleged and proved to constitute the offense: 1. That the persons charged must have devised a scheme or artifice to defraud. 2. They must have intended to effect this scheme by opening or intending to open correspondence with some other person through the Postoffice Establishment or by inciting some other person to open communication with them. 3. And that in carrying out such scheme such person must either have deposited a letter or packet in the postoffice or taken or received one therefrom.

Sec. 221. It is not necessary to constitute this crime that it should have been the intent of the party devising the scheme to defraud more than one person.

This proposition was announced by the Circuit Court of the United States for the District of Colorado in *Weiber vs. U. S.*, 62 Fed. Rep. 740, in which Mr. Justice Brewer concurred. In that case the scheme for which the defendant was convicted briefly stated was this: Stephens was not in fact indebted to Kearney. Kearney pretended to have a claim against Stephens and placed it in the hands of the defendant for collection. A suit was pending by the United States against Stephens for the recovery of moneys alleged to be due for lumber taken off government lands. The defendant caused to be passed through the mails a letter purporting to be from the United States District Attorney to himself in reference to the furnishing of testimony tending to show Stephens liable to the government and then caused the letter thus passing through the postoffice to be sent by one apparently a stranger to Stephens, the intention and expectation being that thereby Stephens would be frightened—blackmailed—into paying the claim of Kearney, in defendant's hands for collection, in order to prevent any disclosures by defendant to the United States District Attorney.

The court held this to be a scheme to defraud—that it was immaterial that it did not result as expected and it was also immaterial that it was uncertain, even exceedingly doubtful, whether Stephens or any other man would be frightened by such a scheme—that the criminality of the defendant did not rest upon the probabilities of success of the scheme, or upon the fact of success.

Sec. 222. The use of a fictitious name is not unlawful unless a fraudulent business is done in that name and mere intent is not enough; something must be done. *U. S. vs. Smith*, 45 Fed. Rep. 561.

Sec. 223. In *U. S. vs. Beatty*, 60 Fed. Rep. 740, where the indictment charged that defendant sent to one S. a circular which set out in substance and which stated that an organ of a particular description worth \$150 would be sent him for \$33 warranted for ten years and to be returned within three years if not satisfactory, in which event the money would be re-

funded; that by this circular defendant intended to induce him to believe that an organ would be delivered to him of the character and upon the terms described, whereas he did not intend to perform the representations contained in said circular but did intend to obtain the said sum of \$33 by means of the said false pretenses, it was held to be sufficient under section 5480 as amended. The judge (Wheeler) said: "The organ proposed by the circular to be sent on receipt of \$33 was specifically described. That intended by the scheme alleged was essentially different. The pretense that such a one as was described would be sent was false, even if one as good or better was intended to be sent. The particular kind might be material to the purchaser and his money might be obtained by false pretenses as to that, although not profitable to the seller."

Sec. 224. An indictment under section 5480, Revised Statutes, as amended by the Act of March 2, 1889 (25 Stat. L. 873), for using the mails for promoting a scheme or artifice to defraud must show that there was a motive of gain on the part of the accused. *U. S. vs. Beach*, 73 Fed. Rep. 160. In that case, the charge was that the prisoner induced the prosecutor to go to Salt Lake City, Utah, and to expend a considerable sum of money in making the journey upon the false pretense that he could have employment as a nurse from one Perkins. Perkins was a mythical person and there was no employment for the prosecutor in Salt Lake City. Judge Hallett held that the statute in this case was not violated because it did not appear that the prisoner gained or hoped to gain anything by the scheme. The judge was mistaken in one respect, and that is he held the scheme or artifice to defraud, mentioned in the first of the section, must be limited to schemes and artifices as are *ejusdam generis* with the particular schemes named in the subsequent portions of the statute. He evidently overlooked the fact that as the section originally stood in the Act of 1872 and in the Revision of 1878, no particular schemes were named but the general words "any scheme or artifice to defraud" were used and the specific

schemes were introduced by the Act of March 2, 1889, and hence, the rule the judge invokes can not apply.

This ruling was made prior to the decision of the Supreme Court of the United States in *Streep vs. U. S.*, 160 U. S. 126 .

Sec. 225. The Postoffice Department has held that the sale of marked cards or other gambling devices so as to enable players to cheat at games with them comes within the provisions of sections 5480 and belongs to the class of "Green Goods" swindles and the vendors of such cards or devices were denied the use of the mails.

Sec. 226. Another device operated by parties in large cities was this: The party would obtain the names of responsible business men throughout the country and would send to them sealed packets containing jewelry of a cheap kind and also containing stamps to cover the postage on the package. With the inclosures letters were sent, in which the addressees were advised that the promoters took the liberty of sending them the jewelry without an order, because it was cheap and if the addressees did not desire to keep it and pay for it to reseal it in a wrapper and use the inclosed stamps to return it. On the outside covers of the packages was printed a statement, directed to postmasters, authorizing them to open the packages if not taken out of the mails and to use the postage inclosed therein to return them to the senders. This all looked fair enough on its face but when the addressees opened the packages or in case the packages were not called for or not accepted by the addressees the postmasters opened and returned them to the senders the latter would insist that some of the articles had been abstracted from the packages and demanded pay for the same; and oftentimes the postmasters or addressees would pay the required sum, rather than be subjected to annoying letters, charging them, virtually, with theft. The scheme was held a fraud and the postmasters were directed by the Postmaster-General not to open any more packages of that kind, or any kind, no matter what directions were printed on the outside covers or wrappers.

Sec. 227. The mailing of a letter ordering goods in pursuance of a plan to defraud by not paying for them under the false pretense that the persons, mailing the orders, were merchants, is a scheme to defraud, under Sec. 5480, R. S.

U. S. vs. Watson, 35 Fed. Rep. 358.

Sec. 228. Brand vs. U. S., 4 Fed. Rep. 394, was a case where the accused perpetrated the fraud by pretending he desired to hire agents requiring the applicants to send him 25 cents.

Sec. 229. In U. S. vs. Finney, 45 Fed. Rep. 41, the defendant was charged with using the mails to carry on a scheme to defraud in this that he represented himself to be the president of a publishing company which was the manufacturer of standard subscription books, for the sale of which it desired to employ agents—the agents were required to deposit \$25 each for outfits—whereas, in fact, he intended to get the \$25 and not furnish the outfits or fill orders to agents. Judge Thayer instructed the jury “to inquire particularly—first, whether the pretense of a desire to employ agents to canvass for the sale of books was in reality a false pretense made for no other purpose than to induce persons to advance to defendant \$25; and secondly, whether defendant’s real purpose was to appropriate such money to his own use, without rendering any equivalent for the money received; and, if the jury answered both of these inquiries in the affirmative, they would be justified in finding the defendant guilty. The Judge went on to say that the scheme was not fraudulent simply because the publishing company did not manufacture books for sale as represented and that the defendant had a right to require a deposit for an outfit and to prescribe the terms on which it would be returned. The whole question was whether the defendant was acting in good or bad faith.

Sec. 230. A party was indicted for carrying on, through the mails, various schemes to defraud. One was that he had high-grade seed wheat which he would furnish for a certain price per bushel. He received various sums of money from various persons, to some of whom he sent the wheat and to

others he did not send it. The judge instructed the jury that as the indictment charged the defendant with the intent to defraud everybody with whom he should come into communication, the government must prove it. The judge said, however, that it might have been sufficient to allege that the defendant intended to defraud some of the persons who should send him money. The jury acquitted defendant. *U. S. vs. Staples*, 45 Fed. Rep. 195.

Another scheme operated by the same party was this: He advertised that they had blueberry plants for sale but on receipt of money, he would send huckleberry plants which he dug in the woods and which did not live after being set out. He was convicted under this charge.

Another scheme he operated was that he would induce publishers of newspapers to insert advertisements for which he did not intend to pay nor did he pay. He was convicted under this charge. In the same case the Judge told the jury that the practice of exaggerating the value of goods offered for sale is not criminal if restricted within reasonable bounds and is not done with fraudulent intent.

Sec. 231. One, who advertises for agents to sell goods and distribute circulars with no intention of employing such agents but intending to incite persons to send him money for agents' outfits without intending any equivalent for the same and intends to effect the scheme through the mails, is guilty of the offense described in the statute, though it also appears that the party has filled all orders made upon him for goods sold. *U. S. vs. Stickle*, 15 Fed. Rep. 798.

Sec. 232. Many cases have come before the Postoffice Department, in which town lots or lands and mining stocks were the ground work of the fraud. Parties advertised that they had laid out towns, generally in the far distant west and would offer the lots therein for sale. Magnificent plats of the towns were prepared and liberally distributed among the people with glowing accounts of the flourishing condition of the towns. These promoters would adroitly state that they desired to get people to build and thus make the other lots more valua-

ble and they would make a deed to anyone desiring it to any unsold lot the purchaser might select upon payment of the mere cost of preparing and taking the acknowledgment of the deed varying in amount from one dollar to two dollars and fifty cents. This proposition seemed so eminently fair that large numbers invested the required sum and got their deeds but when they wrote to the officers of the county, in which the towns were represented to be located, they would learn that the *locus in quo* was in a desert and the towns were myths. The way the promoters of these schemes could afford to make and acknowledge a deed for a dollar or two was by printing all the forms for the deeds and having one of their own number appointed notary public so that to them the cost of a deed was a very small part of what they received.

Other parties operated similar schemes, using large tracts of land as a basis. When inspectors, upon complaint of the victims, were sent to investigate the matter, these lands, represented by the swindlers to flow with milk and honey, were found to be in the most dreary deserts of the rocky mountains.

Sec. 233. The most alluring scheme, however, and the one that appeals to all classes alike is that in which mining stock is offered for sale. Glowing accounts are sent out to the effect that the company (these schemes are always operated ostensibly under the name of a corporation) owns valuable gold, silver, copper or lead mining properties, situated, of course, in some remote part of the country and the stock of 1,000 shares of the par value of \$1,000,000 is offered to the people at the unprecedentedly low price of ten cents on the dollar, in order to raise money, as it is alleged, to develop the mines, which the promoter feels sure will yield not only large profits but even fortunes to the investors. The people bite and then complain and upon investigation the company, it is found, either does not own any property at all or has some *mining claims* that would bring in the local market a mere pittance.

It is a difficult matter, though, for the Postoffice Department to prevent these schemes from being operated through

the mails on account of having to get testimony enough to show that they are intended as frauds and the Department always feels a hesitancy in taking action where a transaction is alleged to be fraudulent but which assumes the form of being perfectly fair and legitimate.

Sec. 234. In a case that came before the postoffice Department the party claimed to have a machine which could be so manipulated as to indicate to investors when to buy or sell stock or grain or other article, which is usually made the subject of "option deals" in the speculative market. The machine was not intended to be used for gambling but simply to assure would-be speculators of the safety of their investments; but the Department, having proof that the owner operated a "bucket shop" by means of the machine, that men invested large sums of money upon faith in the accuracy of the machine induced by the owner, and further that the money thus paid was usually lost, held the scheme to be a fraud.

Sec. 235. In conclusion of this branch of the subject it may be stated generally that each transaction alleged to be fraudulent must be judged by its own facts and it is not deemed necessary to undertake to go into further details as to the frauds that have been brought to the notice of the Department. Enough, it is thought, has been given to elucidate and illustrate the general principles, underlying the schemes, which will aid the student or official in coming to correct conclusions in regard to new cases as they arise.

**MATTER ON POSTAL CARDS, ENVELOPES, OUTSIDE COVERS OR
WRAPPERS.**

This kind of matter does not come strictly under the head of schemes to defraud nor is it prohibited by section 5480 but it is so closely related to the subject of that section that it is deemed appropriate to treat of it in this chapter.

Sec. 236. For a history of legislation on this subject see section 241, post. It will be observed that as the matter

stood by the Act of June 8, 1872, "scurrilous epithets" on postal cards and envelopes were alone prohibited. By the Act of March 3, 1873, the word "indecent" was added; by the Act of July 12, 1876, the words "lewd, obscene, or lascivious" as adjectives and the words "delineations, terms or language" as nouns were inserted and finally by the Act of September 26, 1888 (25 Stat. L. 496), the Statute took the form in which it stands to-day and is as follows:

"That all matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which any delineations, epithets, terms, or language of an indecent, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another may be written or printed, or otherwise impressed or apparent, are hereby declared nonmailable matter, and shall not be conveyed in the mails, nor delivered from any postoffice nor by any letter carriers, and shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe; and any person who shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable matter, and any person, who shall knowingly take the same or cause the same to be taken from the mails, for the purpose of circulating or disposing of or of aiding in the circulation or disposition of the same, shall for each and every offense, upon conviction thereof, be fined not more than \$5,000 or imprisoned at hard labor not more than five years, or both at the discretion of the court."

This amendment materially enlarged the scope and meaning of the Statute.

Sec. 237. The following language on postal cards has been held to come within the Act of Congress of September 26, 1888.

"You have been fighting time all along. * * * I will garnishee and foreclose. But I dislike to do this if you will be half white." U. S. vs. Smith, 69 Fed. Rep. 971.

"It is with regret that I once more ask you to take your choice, I will vindicate myself if I live. The truth and the whole truth must come out." *Griffin vs. Pembroke*, 2 Mo. App. Rep. 980. And in the same case it was held that extraneous evidence was not admissible to show the language on a postal card on its face threatening or abusive was not so intended by the sender and so understood by the sendee.

"You are sharp, all of you are on the beat." *U. S. vs. Davis*, 38 Fed. Rep. 326. But in the same case it was held that the use of the words: "Tell that Rascal to send my book back as he agreed" did not necessarily reflect on the character of the addressee.

"Mr. Editor: I thought that you was publishing a paper for the wheel but I see nothing but rotten Democracy. I am a Republican and a wheeler, and you can take your paper and Democracy and go to hell with it." *U. S. vs. Olney*, 38 Fed. Rep. 328, Note. The court declined to charge the jury that this language was a matter of law scurrilous but left it to the jury as a question of fact if the words were scurrilous and the jury returned a verdict of guilty.

"Your rent was due Thursday, Feb. 25, 1892, and has not been paid and if not paid by Thursday, March 3d, 1892, I will place the matter in the hands of an officer." *U. S. vs. Elliott*, 51 Fed. Rep. 807.

"You have promised and do not perform and I see very plainly you do not intend to pay any attention to my letters or your agreements." *U. S. vs. Simmons*, 61 Fed. Rep. 640.

"Please call and settle account, which is long past due and for which our collector has called several times and oblige."

U. S. vs. Boyle, 40 Fed. Rep. 664. This language was held not to come under the statute but in the same case it was held that a postal card, demanding payment of a debt and stating that "if it is not paid at once we shall place the same with our lawyer for collection is not mailable.

ENVELOPES AND OUTSIDE WRAPPERS.

Sec. 238. A party may send respectful dunning letters in an unsealed envelope on which are printed the words, "Mercantile Protection and Collection Bureau" in display letters of "10 points or long primer French Clarendon type." In *Re Barber*, 75 Fed. Rep. 980.

A letter inclosed in an envelope on which the words "Excelsior Collection Agency" are printed in very large full faced capital letters which occupy more than half of the envelope and are so placed as to be entirely separate from the direction to return to the sender is a violation of the Act.

U. S. vs. *Brown*, 43 Fed. Rep. 135.

THE OUTSIDE COVER OR WRAPPER OF MAIL MATTER.

Sec. 239. There has been a difference of opinion as to what is the meaning of these words. The Assistant Attorney-General for the Postoffice Department has uniformly held that they include only covers or wrappers, as distinct from the mail matter itself, unless the objectionable words appear in connection with the address so as to constitute a part of it. Thus it has been held that if the mail matter has no cover or wrapper in the strict sense and the address is written on the matter itself as on a newspaper or circular and the objectionable words are written or printed in such form that they would probably be seen by one reading the address, it is drawn within the terms of the statute. But it makes no difference that the objectionable words may be written or printed on the paper or circular or other thing, if they do not appear with the address or near it.

In *U. S. vs. Gee*, 45 Fed. Rep. 194, four page circulars were folded oblong and postage stamps placed on the circulars themselves. The circulars were about the size of a sheet of note paper, upon all four pages of which was printed matter and on the outside pages was language "calculated by its terms * * * and obviously intended to reflect injuriously upon the character and conduct of another." Judge Severens di-

rected a verdict for defendant on the ground that the statute applies only to matter exhibited upon an inclosing wrapper or cover and not to matter which is contained in the body of the thing mailed; that "the statute being one constituting a criminal offense, it can not be extended by construction to cases where there is no wrapper or cover at all, even though such cases may be within the reason and policy of the enactment."

A different view of this question was, however, taken in *U. S. vs. Burnell*, 75 Fed. Rep. 825. In that case it appeared that a newspaper called "The Inter-State Tracer" was published by Burnell, Secretary of the State Business Men's Association of Iowa. The paper consisted of 16 pages about 9 x 12 inches. At the top of the outside (front) page appeared the title, date, number of current issue, etc. Upon this front (outside) page, under headings printed in large full faced type of "Wanted" and "Warning," various notices and paragraphs were printed. All the copies of the paper sent to the same postoffice were rolled up together in one package in one wrapper and on this wrapper was written the name of the postoffice. The subscribers' names were written on the front (outside) pages of the paper. When the package reached the postoffice, the postal employees tore off the wrapper in order to find the names of the persons, to whom the papers were to be delivered. If any of these notices had been written on a postal card and sent through the mails, the card would unquestionably have come within the Act of September 26, 1888.

The Judge (Woolson), held that the front page of the paper was a "cover" within the meaning of the Statute quoting from a letter, written by the Assistant Attorney-General for the Postoffice Department to the defendant in 1896, as follows: "In an opinion rendered by Hon. J. N. Tyner, Assistant Attorney-General for the Postoffice Department, June 6, 1891, a 'cover' is defined as that which overlays or over-spreads; and a 'wrapper' that in which something is inclosed. In accordance with the above scurrilous matter appearing upon the outside or overlaying portions of mail matter may be con-

sidered to be upon the cover thereof." The Judge did not think it made any difference whether the outside leaf had printed matter for the public on it or was simply a cover with the title, number and date of the paper on it, or that the outside pages were of a different color from the other parts of the paper or all of the same color or that the cover was consecutively numbered with the other pages. The scurrilous matter on the outside page of the Tracer was held to come within the Statute on the ground that the postal officers must look at this page to ascertain the name of the addressee and in doing this the "manner and style of display" (in the heavy black faced type) were calculated to draw their attention to the objectionable matter to a greater degree than matter on the side of a postal card opposite the address. The matter on this page was in plain view of the official when reading the name of the addressee.

WHAT ARE DELINEATIONS.

Sec. 240. The Postoffice Department held that to bring the matter within the meaning of "delineations" as used in this Statute there must be some mark, writing or printing, etc., and that the mere color of the envelope, cover or wrapper is not embraced in the meaning of this word. But Judge Butler in *U. S. vs. Dodge*, 70 Fed. Rep. 235, held otherwise. The defendant in that case sent duns to debtors in black envelopes with nothing on them but the address. The Judge, holding the use of this envelope to be a violation of the law, said: "The evidence shows that all persons connected with the postal service understood the meaning and object of this method of proceeding. The object is to coerce payment of money by thus exposing the person addressed."

He then went on to say that the black of the envelope was a "delineation" within the meaning of the Statute.

CHAPTER V.

OBSCENE MATTER IN THE MAILS.

Sec. 241. The first time Congress dealt with this question was by the Act of June 8, 1872 (17 Stat. L. 302), section 148 of which provided "That no obscene book, pamphlet, picture, print or other publication of a vulgar, or indecent character, or any letter upon the envelope of which, or postal card upon which scurrilous epithets may have been written or printed or disloyal devices printed or engraved thereon, * * * shall be carried in the mail."

This section was amended by the Act of March 3, 1873 (17 Stat. L. 599) so as to read as follows: "That no obscene, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement or notice of any kind, giving information, directly or indirectly, where or how or of whom or by what means either of the things before mentioned may be obtained or made, or any letter upon the envelope of which or postal card upon which indecent or scurrilous epithets may be written or printed shall be carried in the mails."

This section was again amended by the Act of July 12, 1876 (19 Stat. L. 90) by inserting the word "writing" before the word "print" therein and for the provision in regard to envelopes and postal cards the following was substituted; "and every letter, upon the envelope of which or any postal card upon which indecent, lewd, obscene or lascivious delineations,

epithets, terms, or language may be written or printed," was declared to be nonmailable.

This section, as thus amended, went into the Revised Statutes of 1878 as section 3893; and it was again amended by the Act of September 26, 1888 (1 Sup. R. S. 621); and as thus amended the section stands now and reads as follows: "Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how or of whom or by what means any of the hereinbefore mentioned matters, articles, or things may be obtained or made, whether sealed as first class matter or not, are hereby declared to be nonmailable matter, and shall not be conveyed in the mails nor delivered from any postoffice nor by any letter carrier, and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter, and every person who shall knowingly take the same, or cause the same to be taken, from the mails for the purpose of circulating or disposing of or of aiding in the circulation or disposition of the same, shall, for each and every offense, be fined upon conviction thereof not more than \$5,000 or imprisoned at hard labor not more than five years, or both, at the discretion of the court."

It will be observed that the amendment of September 26, 1888, materially enlarges the scope of the Statute as to obscene matter but omits entirely the provision in regard to matter on envelopes and postal cards which with material amendments was enacted into a separate Statute at that time.

Sec. 242. Matter is said to be obscene when its tendency is to excite libidinous thoughts and desires or to corrupt and deprave those, whose minds are open to such immoral influences and into whose hands it may fall. *Queen vs. Hicklin*,

3 Eng. L. R. Q. B. 360; U. S. vs. Bennett, 16 Blatch, 338; U. S. vs. Harmon, 45 Fed. Rep. 414; U. S. vs. Smith, 45 Fed. Rep. 476; U. S. vs. Clarke, 38 Fed. Rep. 372; U. S. vs. Chesman, 19 Fed. Rep. 732; U. S. vs. Slenker, 32 Fed. Rep. 691; Swearingen vs. U. S., 161 U. S. 446. "Persons publishing books, necessary for medical instruction, may be liable for uttering obscene libels, if the effect is to debauch society or to make money by pandering to lascivious curiosity. That the object is philanthropic or scientific is no defense." 2d Wharton Cr. Law, Sec. 2545. In support of this proposition the learned author cites *Com. vs. Landis*, 8 Phila. 453 and *R. vs. Hicklin*, *supra*. In the *Landis* case, an obscene medical book was the basis of the prosecution. The defendant claimed that the book was a scientific, medical publication, containing matter taken from standard medical works, but the book was for general dissemination and he was convicted. In that case the jury was instructed "that it did not matter whether the things published in the book were true and in conformity to nature and the laws of our being or not. If they were unfit to be published and intended to inflame lewd passions, it was an obscene libel. That even scientific and medical publications, containing illustrations, exhibiting the human form, if wantonly exposed in the open market, with a wanton and wicked desire to create a demand for them and not to promote the good of society by placing them in proper hands for useful purposes, would, if tending to excite lewd desires, be held to be obscene libels." To the same effect is the *Slenker* and the *Swearingen* cases, *supra*. In the case of *U. S. vs. Clarke*, *supra*, the matter complained of was first, a small pamphlet in paper cover, entitled "Dr. Clarke's Treatise on Venereal, Sexual, Nervous and Special Diseases," and consisted mainly of a description of the causes and effects of venereal diseases; and secondly, of two circulars one of which described, in separate paragraphs, the symptoms of various venereal diseases and the other contained a list of questions to be answered. That was a prosecution for sending this pamphlet

and these circulars through the mails in violation of the Federal Statute against obscenity. Judge Thayer, charging the jury, said: "There is to be found in every community a class of people, who are so intelligent or so mature, that their minds are not liable to be affected by reading matter, however, obscene, lewd, or indecent it may be. Then there is another large class to be found in every community—the young, immature, the ignorant and those who are sensually inclined—who are liable to be influenced to their harm, by reading indecent and obscene publications. The statute, under which this indictment is found, was designed to protect the latter class from harm, and it is a wholesome statute. Hence, in judging of the tendency of the publications to deprave and corrupt the mind, or to excite lustful or sensual desires (which are the test of obscenity and lewdness) you should consider the effect, that the publications would have on the minds of that class of persons, whom the statute aims to protect, and the liability of the publications to get into the hands of that class of persons, rather than the effect such publications would have on people of a high order of intelligence and those who have reached mature years, who, by reason of their intelligence, or years, are steeled against such influences." Judge Thayer also told the jury that a physician could communicate, through the mails, to his patient in terms, that would otherwise be obscene, but before he could do this, the relation of patient and physician must exist, and he also held that the pamphlet and circulars in that case could not be considered standard medical works or publications. The indictment in the case of *U. S. vs. Chesman, supra*, describes the publication as "A pamphlet entitled 'Prof. Harris' New Discovery for the Radical Cure of Spermatorrhoea and Impotency, with the Anatomy and Physiology of the Generative Organs, illustrated; and the science of a Radical Cure,' by his new departure, in the treatment of those troubles, viz., local absorption at the seat of the disease." The question presented to the court was whether the publications, complained of, came within the provision of section 3893, R. S., and McCreary, J., said: "We

have considered this question after a full oral argument by counsel, and we are clearly of the opinion that the publications, referred to in the indictment and information, do fall within the provisions of this section of the statute. They are clearly both obscene and indecent, and in our opinion within the meaning of the statute. It is not necessary perhaps, to say more, but I may remark that it has been insisted by counsel for defendant, with great earnestness, that the publications, in question, are in their character, medical, and that the matters complained of are, to a large extent, extracts from medical standard works. It may be, and probably is true that much of the offensive matter is taken from books upon medicine and surgery, which would be proper enough for the general use for members and students of the profession. There are many things in the standard works upon these subjects, which, if printed in pamphlet form and spread broadcast among the community, being sent through the mails to persons of all classes including boys and girls, would be highly indecent and obscene." The publication set out in the indictment in the case of U. S. vs. Harmon, *supra*, was an article in a paper called "Lucifer" headed "A Physician's Testimony," purporting to be written by one, Richard V. O'Neill, M. D. The doctor in this communication set out, with great particularity, various instances, falling within his professional experience and practice, of abuses of women by their husbands in coercive cohabitations; of family habits of men, boys and girls, gratifying an unnamable propensity, and the unnatural intercourse between a man and beasts. These acts were described in blunt, coarse terms, too indecent to be set out in a statement of the case in *haec verba*. The defendant was permitted to testify that his motive in publishing such articles, was to improve the sexual habit, to correct its abuse, and thereby better the human race; and it was shown by evidence that in all other relations of life, he bore a good character as a peaceable, well conducted citizen. Judge Phillips said: "Laws of this kind are made for society in the aggregate, and not in particular. How would the language, the subject-mat-

ter in this article from the pen of Richard V. O'Neill, M. D., impress and affect the average man and woman of intelligence and sensibility? What is its probable effect upon society in general? How would such language and matter impress a public assembly of decent men and women? The subjects discussed and the language employed are too coarse, and indecent for the man of average education and refinement to recapitulate." And the judge held that it made no difference how pure the motives of the defendant may have been in the publication of such matter. In the *U. S. vs. Smith, supra*, it appeared that the defendant mailed a pamphlet entitled "A Monitor for Men," which purported to be a medical treatise touching certain foul diseases and their cure and a pamphlet entitled "Questions for Men Only," which consisted "of 120 printed questions touching some seven private diseases;" both of the pamphlets purporting to be issued by "Gun Wa, Chinese Graduate of Botany." Judge Jenkins said: "It is said of this pamphlet that it is a medical treatise without illustration, and with a possible exception, expressed in clean and wholesome language. In an able argument, the counsel for the defendant asserted that it was the highest duty to instruct the youth in the anatomy of the human body, and the laws of its nature, warning them of the grievous result flowing from infraction of such law; and that a work, upon such a subject, devoid of filthy language, can not be properly classed as obscene. Whether an act or language is obscene depends upon circumstances. The public exposure of the person is most obscene, yet the necessary exhibition of the person to a physician is not only innocent, but is a proper act, dictated by positive duty. The condition determines the quality of the act. Thus the nude in art is not of necessity indecent but it may be so conditioned as to come under the ban of condemnation.

Here is a publication touching certain loathsome diseases of the generative organs. Such a document, intended for general circulation, liable to fall into the hands of the immature, might well be corrupting. It is of no consequence that the language employed may be pure. The law has rela-

tion as well to the subject as to its dress. Both the subject and its treatment must be free from obscenity."

This eminent Judge also holds that a physician may communicate through the mails with his patient in language that would, under other circumstances, be obscene, but before he can do that, the relation of physician and patient must first exist. It being conceded that a physician can use the mails in the treatment of his patient, another question confronts the Department and that is, when does the relation of physician and patient, in a legal sense, exist? It may be answered that this relation exists when there is a contract express or implied, by which the physician binds himself to treat the patient and the patient consents to be treated. This question has often arisen in the courts when called upon to determine when the relation of physician and patient exists, so as to come within the rule forbidding the former to testify as to confidential communications made to him by the latter. A doctor who advertises in the public press that he will send his publications to any one calling for them can not, in any proper sense, be held to occupy the relation of physician to those, who do call for them. These medical pamphlets are usually sent out promiscuously to the public for the purpose of advertising the medicines, or appliances of those, sending them out. To authorize their transmission through the mails, if obscene, the sender must occupy the relation of physician to those to whom they are sent and when the relation does exist there is no motive for sending what was simply and originally intended as an advertisement to induce the creation of that relation.

Sec. 243. The Supreme Court of the United States in *Swearingen vs. U. S.*, *supra*, held that the words "Obscene, lewd or lascivious," as used in section 3893, R. S., refer only to publications which are immoral by reason of their relation to sexual impurity, the words having the same meaning as given them at common law in prosecutions for obscene libel.

And this was the ruling in *U. S. vs. Wightman*, 29 Fed. Rep. 636, where it was held that a letter, although exceedingly coarse and vulgar and grossly libelous imputing to the person

addressed an atrocious crime—but which has no tendency to excite libidinous thoughts or to corrupt the morals of those whose minds are open to such influences, is not obscene, lewd or lascivious within the meaning of section 3893.

Sec. 244. There has been in the courts a contrariety of opinion whether a private sealed letter came within the meaning of this statute. Some courts vigorously insisted that a letter did not come within the meaning of the act because it was not a publication. *U. S. vs. Clark*, 43 Fed. Rep. 574; *U. S. vs. Wilson*, 58 Id. 768; *U. S. vs. Warner*, 59 Id. 305; and *U. S. vs. Jarvis*, 59 Id. 357; while others contended that a letter came within the Act. *U. S. vs. Andrews*, 58 Fed. Rep. 86; *In Re Wahl*, 42 Id. 822; *U. S. vs. Martin*, 50 Id. 918; *U. S. vs. Nathan*, 61 Id. 936; and *U. S. vs. Ling*, 61 Id. 1001. Then there came the case of *Grimm vs. U. S.* 156 U. S. 604, followed by *Andrews vs. U. S.*, 162 U. S. 420, in which the Supreme Court of the United States distinctly held that the mailing of a private sealed letter containing obscene matter, on the envelope of which nothing appears except the name and address, is an offense within the Statute.

Sec. 245. In the *U. S. vs. Lamkin*, 73 Fed. Rep. 459, it was held that there is no Statute providing a punishment for the mailing of letters which are free from lewd and indecent language, expressions or words, although they may have been written for the purpose of seduction or to obtain meetings for immoral purposes.

This case is in conflict with *U. S. vs. Martin*, 50 Fed. Rep. 918, where it was held that a letter from a man to an unmarried woman, proposing a clandestine trip to a neighborhood town to return next morning, he to pay expenses and five dollars besides, is an obscene letter within the meaning of the Act making such matter nonmailable although it contains no words which are themselves obscene. And the *Lamkin* case seems to be in conflict also with the decision of the Supreme Court of the United States in *Dunlop vs. U. S.*, 165 U. S. 486, where it was held that advertisements, published by a newspaper giving information where courtesans could be found,

came within the Act, although such advertisements were couched in the most chaste and elegant language. The decision of the Supreme Court is substantially to the effect that any publication, which appeals to and is calculated to excite the sexual passion, is obscene within the contemplation of the law. And the rule thus laid down embraces certain newspapers which deal entirely or chiefly in the escapades of men and women in respect of their sexual relations, though at one time the Postoffice Department did not go to the extent of excluding such papers from the mails; and the question of their mailability under this law has not been before the Federal courts. Some of the States took up the question, however, and passed statutes to cover them and these statutes have been upheld by the State Courts.

Sec. 246. On a prosecution for mailing obscene matter, defendant is not entitled to an acquittal merely because he did not know that the matter might be characterized as obscene. Knowing what matter is to be published he must determine at his peril whether it be obscene or not. *Rosen vs. U. S.*, 161 U. S. 29.

CHAPTER VI.

THE ADMINISTRATION OF THE LAW BY THE POSTOFFICE DEPARTMENT.

Sec. 247. This chapter will be devoted to a discussion of the questions that have arisen and that will probably arise relative to the administrative provisions of the laws against lotteries, frauds and obscene matter. In the preceding chapters the discussion was directed to the general rules by which lottery and fraudulent schemes and obscene matter might be known but when the prohibited matter is found in the mails or is offered for mailing, other serious and embarrassing questions arise in regard to what action shall be taken to prevent the advertisement of the prohibited schemes or matter through the mails. It will be observed that Congress has seen fit to deal with the different classes of nonmailable matter in different ways. As to lottery and fraudulent schemes the laws provide three remedies, first, by indictment, trial and punishment; second, by excluding open, i. e., unsealed matter from the mails and third by issuing what is known as a "fraud order" against the promoter, which directs the postmaster to refuse to deliver to him any mail matter whatever but as to obscene matter two remedies only are provided. One is by indictment and the other is by excluding open matter from the mails. The Postmaster-General is not authorized to issue fraud orders against parties sending obscene matter through the mails though no good reason for this can be perceived where the party's business is dealing in such matter.

It is not proposed in this treatise to notice the enforcement of these laws so far as the courts are concerned, but to examine the methods provided by law, by which the Postoffice Department can and does take direct action on the prohibited matter and against the promoters of fraudulent and lottery schemes and to discuss the constitutional and legal questions that have arisen in the administration of these laws.

THE METHODS PROVIDED BY LAW FOR THE ENFORCEMENT OF
THESE LAWS BY THE POSTOFFICE DEPARTMENT.

Sec. 248. The Department is authorized to act directly against the prohibited matter itself when it is open, or unsealed. The Department has no right under the law to open a sealed packet for any purpose whatever, though it be addressed to a party or company known to be conducting a lottery or fraudulent scheme through the mails. This proposition is settled not only by the express terms of the laws themselves but also by the decisions of the courts and the Postoffice Department and Department of Justice. One exception to this rule must be noted, however, and that is the Postmaster-General claims the power and has exercised the power to open sealed letters and to refuse to carry letters addressed to the enemies of our country in time of war. This power is not expressly conferred by law but it is exercised under the war power. During the recent Spanish-American War the Postmaster-General directed that all letters addressed to the Spanish Minister after his departure from Washington City and other Spanish Officials be seized and opened but so far as known the contents of these letters have not been made public.

So sacred has the seal of mail matter been regarded by the Postoffice Department that even a packet that is sealed when mailed but which is broken open accidentally or even by design during transit is held to be still constructively under seal and must be delivered according to the directions thereon, though it pertains to a lottery or fraudulent scheme, or contains other

prohibited matter. This rule, however, is not observed in England or Continental Europe. The heads of the Postal Establishments there possess the power to issue orders for the seizure and opening of letters, whenever it is believed the seal covers prohibited matter and especially treasonable matter. 79 Hanzard's Par. Debates, 318 and May's Coun. His. 282. In England this power is seldom exercised at this time. The people are there, as they are here, restive under a practice of prying into correspondence which, they deem, ought to be confidential and personal.

But an important question may be raised and that is what is matter under seal and what is to be held to be open matter. In answer to this question it may be stated that sealed matter does not include letters or packets of letters only, but a party has a right under the Postal Laws and Regulations to seal any matter whatsoever and in that case the postal authorities have no right to break the seal to ascertain what is contained therein. Whenever mail matter is sealed, however, letter postage must be paid and as a rule the amount of the postage required deters the sender from sealing any package, except what is strictly defined as first class matter.

But this is not universally true, especially in regard to obscene matter. Ordinarily the senders of that kind of matter seal it so as to prevent detection though the postage is largely increased thereby.

In this connection another question may be raised and that is what is a seal, when applied to mail matter? To constitute a sealed packet the whole of the matter inclosed must be covered and concealed from view, as in an envelope or closed cover or wrapper. It is not sufficient that the seal of the cover or wrapper be such that it has to be broken in order to see what is contained therein. Second, third and fourth class matter is often wrapped and the wrapper or cover sealed so that it is impossible to know what is contained therein without breaking the seal. Indeed the regulations of the Postoffice Department require that matter belonging to these classes shall be so wrapped and covered as to make it easy for

the postal officials to examine it. These officials are authorized to break the seals on covers of this matter when the matter is not wholly inclosed in the sealed cover or wrapper to see whether the matter be mailable or not, when they have reason to believe it should not be transmitted through the mails. And there is but little doubt if a package of unmailable matter of the second, third and fourth classes should be sealed by the sender in order to prevent its exclusion from the mails and the package should be accidentally broken open during transit, the postal officials would have the right to treat it as if it had never been under seal. The rule above stated in regard to matter under seal, when the seal is broken during transit, applies only to letters or matter wholly or partly in writing.

Sec. 249. Open matter, that is found to pertain to lottery or fraudulent schemes or to be obscene, or scurrilous matter upon postal cards, envelopes, covers or wrappers, should not be received by postmasters for mailing but if it should be inadvertently received it should be withheld from further transmission through the mails, and forwarded to the Postoffice Department unless the postmasters be in doubt about what disposition they ought to make of the matter in a given case, when they should withhold the matter and notify the Department. If the matter be nonmailable and is clearly of no value, except to those who desire to violate the law, the Department directs the postmasters to destroy it, otherwise it is ordered to be sent to Washington to be disposed of. After the matter reaches the Department at Washington either through the action of the postmasters on their own motion or by order of the Postmaster-General it is usually destroyed if it be found to be of the prohibited class. Postal clerks on postal cars and other officials handling mail matter at postoffices or in transit are required to withhold matter deemed by them to be non-mailable until they can be advised by those higher in authority what to do with it.

The postmasters and other postal officials are required to treat matter of foreign origin as they treat domestic matter. It makes no difference that a newspaper has been printed and

mailed in a foreign country. As soon as it reaches our shores and comes under our jurisdiction it is excluded from the mails if it be found to contain prohibited matter. It was once thought that the comity of nations required us to carry, without question, any matter that citizens of foreign governments might send us but this doctrine has been exploded and the right of each government to refuse to carry matter forbidden by its laws is now recognized by a formal regulation of the Universal Postal Union. The Supreme Court of the United States in the Horner Case went to the extent to decide that we could not only exclude from the mails even foreign government bonds and the advertisement of them if they contained the lottery element, but also make it a criminal offense to advertise or sell such bonds by mail.

Sec. 250. But the power of the Postmaster-General goes beyond dealing simply with open matter, so far as lottery and fraudulent schemes are concerned. Under sections 3929, and 4041, R. S., he has authority, upon evidence satisfactory to him, to issue what is known as a "fraud order" against the party who, he finds, is conducting such a scheme through the mails. This order directs the postmaster, to whom it is addressed or in case of a foreign scheme, when it is addressed to all postmasters in the United States, to refuse to deliver to the party any matter whatever under seal and to refuse to pay any postal money order to him.

The form of such order, now in use, is as follows:

"It having been made to appear to the Postmaster-General, upon evidence satisfactory to him, that —— is engaged in conducting a scheme or device for obtaining money through the mails in violation of the act of Congress entitled 'An Act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes,' approved September 19, 1890. Now, therefore, by authority vested in him by said Act and by the Act of Congress entitled 'An Act for the suppression of lottery traffic through international and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States,' approved March 2, 1895, the Postmaster-

General hereby forbids you to pay any postal money order drawn to the order of said party or parties, and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of a duplicate money order applied for and obtained under the regulations of the Department.

And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said — to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the word 'Fraudulent' plainly written or stamped upon the outside of such letters or matter. Provided, however, that where there is nothing to indicate who are the senders of letters not registered or other matter, you are directed in that case to send such letters and matter to the Dead Letter Office with the word 'Fraudulent' plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto."

The power thus conferred upon the Postmaster-General and its influence in the administration of the Postal System will not be further examined at this time as the subject more properly falls under the third and fourth questions involving the constitutionality of these laws hereafter stated. When those questions are reached in their order this power will be fully discussed.

CONSTITUTIONAL AND LEGAL QUESTIONS THAT HAVE ARISEN IN
REGARD TO THE ADMINISTRATIVE FEATURES
OF THESE LAWS.

Sec. 251. It can be readily perceived that in a country having an area and population like ours many serious and delicate questions, affecting the personal and property interests of the people in the administration of our vast postal system, would arise and continue to arise until they have been decided so many times that further agitation or contention is deemed

futile by those who desire to use the mails for prohibited purposes. The distinct questions, that have arisen with regard to these laws in general, whether in their application to the judicial powers conferred on the courts or to the administrative and ministerial duties imposed upon the Postoffice Department are:

First. Are these laws unconstitutional because they deprive the citizen of his property and liberty without due process of law?

Second. Are they unconstitutional because they abridge the freedom of the Press in violation of the Constitution of the United States?

Third. Had Congress the power to authorize the Postmaster-General to issue a fraud order against a party, who, he found on evidence satisfactory to him, was conducting a lottery through the mails, forbidding the delivery of registered letters or the payment of postal money orders to him?

Fourth. And had Congress the power to enact the fourth section of the Act of March 2, 1895, by which the Postmaster-General was authorized to issue a fraud order against a party found to be conducting through the mails a fraudulent or lottery scheme, forbidding the delivery of any sealed mail matter whatever to him?

The first two questions have been fully and finally settled by the Supreme Court of the United States, the third has been determined several times by the inferior courts of the United States but not by the court of final resort and the fourth is still pending and has not been conclusively decided one way or the other.

Do these laws deprive the citizen of his property or liberty without due process of law and do they abridge the freedom of the Press in violation of the Constitution of the United States? This question embodies the first two questions propounded above and it has been answered in the negative in both its aspects by the Supreme Court of the United States.

Sec. 252. The first time any constitutional question in respect to the Anti-Lottery Statute of Congress came before

the Supreme Court of the United States was in May, 1878, in the matter of Orlando Jackson, 96 U. S. 727. Jackson, having been convicted and sentenced to pay a fine for depositing in the mails a circular concerning a lottery, applied to that court for a writ of Habeas Corpus and asked to be discharged from custody on the ground that the act, under which he was convicted, was unconstitutional and void. In that case, counsel for petitioner argued that "as all letters and packets were mail matter at the time of the adoption of the Constitution, they must always be carried without restriction or qualification except in the nature of reasonable regulation while the duty of carrying the mails is imposed upon Congress;" and "with respect to letters and packets Congress has no alternative but to carry them, irrespective of the intelligence they convey or abandon the postal system entirely and remit the entire subject to the people with whom it originally rested." It was argued further "that Congress has no power to prohibit the transmission of intelligence, public or private, through the mails; and any statute which distinguishes mailable from unmailable matter merely by the nature of the intelligence offered for transmission is an unconstitutional enactment." "If the people," the counsel went on to state, "had conferred upon Congress authority to regulate public morals, the Statute before us would not be open to judicial criticism; but the people never conferred and Congress can not exercise any such right except where the General Government has territorial jurisdiction." In reply to these contentions the court said: "The power vested in Congress 'To establish postoffices and postroads' has been practically construed since the foundation of the Government to authorize not merely the designation of the routes and the offices but the carriage of the mails and all measures necessary to secure the safe and speedy transit and the prompt delivery of its contents. * * * The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded." After referring to the controversy that arose in

1836 in regard to the exclusion from the mails of publications containing inflammatory appeals, addressed to the passions of slaves, tending to stimulate them to insurrection and the opinion then held by a majority of the public men of the day that Congress had no power to refuse to carry such publications in the mails, the court went on to remark: "Great reliance is placed by the petitioner upon these views, coming as they did, in many instances, from men alike distinguished as jurists and statesmen. But it was evident they were founded upon the assumption that it was competent for Congress to prohibit the transportation of newspapers and pamphlets over postal routes in any other way than by mail; and, of course it would follow, that if with such a prohibition the transportation in the mail could also be forbidden the circulation of the documents would be destroyed and a fatal blow given to the freedom of the press. But we do not think that Congress possesses the power to prevent the transportation, in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and to prevent rival postal systems, it may perhaps prohibit the carriage by others, for hire, over postal routes, of articles which legitimately constitute mail matter in the sense in which those terms were used when the Constitution was adopted—consisting of letters and newspapers and pamphlets when not sent as merchandise—but further than this, its power of prohibition can not extend. Whilst regulations, excluding matter from the mails, can not be enforced in a way which would require or permit an examination into letters or sealed packages subject to letter postage without warrant issued upon oath or affirmation in search for prohibited matter, they may be enforced upon competent evidence of their violation obtained in other ways; as from the parties receiving the letters or packages or from agents, depositing them in the postoffice or others cognizant of the facts. And, as to objectionable printed matter, which is open to examination, the regulations may be enforced in a similar way by the imposition of penalties for their violation through the courts and, in some cases, by the direct action of the officers of the

Postal service. In many instances these officers can act upon their own inspection and, from the nature of the case, must act without other proof; as when the postage is not prepaid, or where there is an excess of weight over the amount prescribed or where the object is exposed and shows, unmistakably, that it is prohibited as in the case of an obscene picture or print. The evidence, respecting them, is seen by every one and is, in its nature, conclusive. In excluding various articles from the mails the object of Congress has not been to interfere with the freedom of the press or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals." Referring to the Act of Congress, excluding obscene matter from the mails, the court continues: "All that Congress meant by this Act was that the mail should not be used to transport such corrupting publications and articles. The same inhibition has been extended to circulars concerning lotteries, institutions which are supposed to have a demoralizing influence upon the people."

The court did not answer the argument in regard to the exercise of the police power by the United States, in its relation to the mail service, rather than its incidental reference to the refusal of the government to furnish mail "facilities for the distribution of matter deemed injurious to the public morals" or "to transport such corrupting publications and articles which are supposed to have a demoralizing influence upon the people."

Sec. 253. The next time the constitutionality of these laws was drawn in question was in 1891-2, after the passage of the amendatory Act of September 19, 1890, in re *Rapier and Dupree*, 143 U. S. 110. *Rapier* was the publisher of a newspaper and advertised the Louisiana Lottery in his paper, the *Register of Mobile*, Alabama, for which he was arrested upon an information against him. He sued out a writ of Habeas Corpus before the Supreme Court of the United States and asked to be discharged upon the ground

that the Act, under which he was arrested, was unconstitutional. Some of the ablest lawyers in the United States appeared for the petitioner, and urged, 1, "That Congress can not make any act a crime unless it is, in some manner, necessary or proper, in the execution of its own powers, to do so." 2, "Congress in the exercise of its police power can not excluded matter concerning lotteries from the mails on the ground that the circulation of such matter would have an immoral or injurious tendency, because the power to declare lotteries crimes or to punish them as such or to obstruct or impede them because they are crimes is lodged exclusively with the State Government. 3. The Act abridges the freedom of the press; and that the law which excludes a newspaper because it contains a lottery advertisement undoubtedly censors the matter contained in the journal and it punishes its editor on account of the matter so published, if the deprivation of a common right be punishment. Discrimination in the use of the mails because of opinions expressed in its columns on a moral question smacks of proscription; and when the newspaper is published in a state, which, by its laws, sanctions the opinions expressed, such discrimination amounts to direct interference with the domestic policy of a State on a moral question which the State alone is competent to determine." But the court replied, in this language: "It is insisted that the express powers of Congress are limited in their exercise to the objects for which they were instituted and that in order to justify Congress in exercising any incidental or implied powers to carry into effect its express authority, it must appear that there is some relation between the means employed and the legitimate end. This is true, but while the legitimate end of the exercise of the power in question is to furnish mail facilities for the people of the United States, it is also true that mail facilities are not required to be furnished for every purpose. The States, before the Union was formed, could establish postoffices and postroads, and, in so doing, could bring into play the police power in the protection of their citizens from the use of the means so provided for the purposes supposed to exert a de-

moralizing influence upon the people. When the power to establish postoffices and postroads was surrendered to Congress, it was as a complete power and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the states in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality. The argument that there is a distinction between *mala prohibita* and *mala in se*, and that Congress might forbid the use of the mails in promotion of such acts as are universally regarded as *mala in se*, including all such crimes as murder, arson, burglary, etc., and the offense of circulating obscene books and papers but can not do so in respect of other matters, which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of petitioners, since it would be for Congress to determine what are within and what are without the rule; but we think there is no room for such a distinction here, and that it must be left to Congress in the exercise of a sound discretion to determine in what manner it will exercise the power it undoubtedly possesses. We can not regard the right to operate a lottery as a fundamental right * * * nor are we able to see that Congress can be held in its enactment to have abridged the freedom of the press. The circulation of newspapers is not prohibited but the government declines to become an agent in the circulation of printed matter, which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the Constitutional provision, unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matter condemned by its judgment, through the government agencies, which it controls. That the power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all."

In this case, as well as in *Horner vs. U. S.*, 143 U. S. 207, and *Horner vs. U. S.*, 147 U. S. 449, the principles laid down in the *Jackson* case were referred to and distinctly approved.

Since these decisions, as remarked by Mr. Justice Caldwell in *Harmon vs. U. S.*, 50 Fed. Rep. 921, "if authority can ever silence contention the constitutionality of this act of Congress is no longer open to discussion," at least so far as the questions involved in the *Jackson* and *Rapier* cases are concerned.

Sec. 253a. These cases have settled the following points:

1. The power, possessed by Congress to establish postoffices and postroads, embraces the regulation of the entire postal system of the country. The power to designate what shall be carried in the mails necessarily involves the right to determine what shall be excluded.

2. Congress has the power to exclude from the mails whatever it may deem injurious to the public morals and obscene matter and matter relating to lottery schemes is injurious to the public morals in a high degree.

3. The Lottery Act does not deprive the citizen of his property or liberty without due process of law nor does it abridge the freedom of the press.

Sec. 253b. The third and fourth questions above propounded can be most satisfactorily examined and answered under one head and at the same time.

Was the law prior to the enactment of section four of the Act of March 2, 1895, authorizing the Postmaster-General to issue an order forbidding the delivery of registered letters or the payment of money orders to a party found to be conducting a lottery or fraudulent scheme through the mails constitutional, and is the fourth section of the above cited Act, authorizing the Postmaster-General to deprive a citizen not only of the facilities afforded by the Registry and Money Order Systems but also by the mails in general, constitutional?

This question was not involved in the *Jackson* and *Rapier* cases and it has never been answered by the Supreme Court of the United States but it has been before the inferior courts of the United States on several occasions. Against this

Statute it is contended that it confers judicial power on the Postmaster-General, an officer possessing ministerial powers only, and that by the action of that officer the citizen would be deprived of his property and liberty without due process of law.

These contentions open a wide field for the discussion of constitutional law.

Sec. 254. The first proposition presented is whether the power conferred on the Postmaster-General by sections 3929 and 4041, Revised Statutes, and the fourth section of the Act of March 2, 1895, is in its nature judicial or simply ministerial. If the power be a judicial one, in the strict sense, it can not constitutionally be confided to a ministerial officer but must be conferred on the courts, if conferred at all. The Postmaster-General, being an executive officer, does not use judicial forms and can not exercise judicial power and yet there is no question but that he may exercise judicial functions. *United States vs. The Commissioners*, 5 Wallace, 565, and *Wilkes vs. Dinsman*, 7 Howard, 129.

Judicial power is that power exercised by a court. It implies deliberation and discretion. But it is not every act that requires deliberation and discretion that can be denominated a judicial act, or the performance of which requires the exercise of judicial power, as contemplated in the general distribution of powers under the Constitution. There are but few public officers, be they executive, judicial or legislative, whose duties do not impose the necessity of deliberation and the exercise of discretion. The same duty may be either legislative, executive, or judicial, accordingly as its performance is required of one or the other department.

The legislative branch frequently exercises judicial power in that it inflicts punishment. It also adjudicates private rights in allowing or rejecting claims for services performed or property taken or destroyed by the government.

A sheriff of a county in acting under a writ of execution issued to him from a court in the performance of his duty must exercise judgment and discretion. He must determine

how much property to levy on and oftentimes he is required to determine at his peril whether the defendant in the execution owns the property or not and then he is called on to determine whether the defendant is entitled to homestead and other exemptions under the law and if he determines that question in the affirmative to set off such exemptions.

The executive branch of the government uses elements in executing its offices which when employed by a court are called judicial.

In theory, the legislative, judicial, and executive powers of the government are distributed respectively to the Congress, to the Courts and to the Executive. In practice each of these departments is compelled, in the effective exercise of its own peculiar powers, to avail itself of some of the elements which in theory belong to another department. When so used they operate as a means to the full exercise of power, but when used by the departments to which they properly belong, they crystallize into power itself. The element which, employed by a court, results in a judgment, when used by Congress proves a mere aid to the discharge of the legislative function. When called in aid by the executive department, it serves but to guide and render effective the executive power. The true test will always be the purpose for which the use is made, and its adaptability to accomplish that purpose—the purpose itself being legitimate.

It is not far wrong to say that the distribution of powers is made by the Constitution only so far as it concerns the enactment and ascertainment of rights and their enforcement, as they concern the individual citizen in his relations with his fellow citizens; but that, in so far as the administration of the legislative, judicial and executive branches of the government is involved, each department retains all power necessary to fully and efficiently perform its appropriate duties, so that when an official act is performed by one branch of the government, the inquiry should not be as to the nature of the element used, but as to its adaptability in aid of the end sought. If it be found fairly adapted to accomplish the end desired, it must

be held constitutionally to belong to the department exercising it. The Constitution requiring the thing to be done it is constitutional to use the means proper to accomplish the result.

A review of the authorities will show that the power conferred on the Postmaster-General by the Statutes in question is not judicial in its strict sense but involves the exercise of an administrative function, coupled with the exercise of discretion and judgment, partaking somewhat of the nature of judicial power.

Sec. 255. In the case of *Marberry vs. Madison*, 1 Cranch 137, President Adams had nominated and the Senate had confirmed Marberry as a Justice of the Peace of the District of Columbia; and a commission in due form was signed by the President, appointing him such Justice and the seal of the United States was duly affixed thereto by the Secretary of State, but the commission had not been handed to Marberry when the offices of the government were transferred to the administration of President Jefferson. Mr. Madison, the new Secretary of State, refused to deliver the commission and a mandamus was applied for to the Supreme Court to compel him to do so. The court held that the appointment had been made and completed and that Marberry was entitled to his commission and that the delivery of it to him was a mere ministerial act which involved no further official discretion on the part of the Secretary and could be enforced. But the court refused to issue the mandamus on the ground that it had no jurisdiction to issue it.

Sec. 256. In *Kendall vs. Stokes*, 12 Peters, 524, it appeared that Stockton and Stokes, as contractors for carrying the mails, had claims against the government, and a controversy arose between them and the Postoffice Department in regard to them. Congress passed an act for their relief by which the Solicitor of the Treasury was authorized to adjust their claims and to make them such allowances as the evidence might show them equitably entitled to. The Solicitor of the Treasury accordingly investigated the claims and reported the amount he thought they were entitled to receive, but the Post-

master-General, Kendall, refused to give them credit therefor as directed by law. This, the court held, he could be compelled to do by mandamus because it was a ministerial duty to be performed and not an official act, requiring the exercise of judgment or discretion.

Sec. 257. In *Decatur vs. Paulding*, 14 Peters, 497, the facts were these: By the Act of March 3, 1837, the widow of any officer who had died in the naval service was entitled to a pension equal to half his monthly pay, from his death until her death or marriage. On the same day Congress passed a resolution granting a pension to Mrs. Decatur, widow of Stephen Decatur, for five years, commencing June 30, 1834, and the arrearages of the half pay of a port captain from Commodore Decatur's death to the 30 June, 1834. Mrs. Decatur applied and received her pension under the general law with a reservation of her rights under the resolution claiming the pension granted by that also. The Secretary of the Navy, acting under the advice of the Attorney-General, decided that she could not have both. Thereupon, she applied for a mandamus to compel the Secretary to comply with the resolution in her favor. Chief Justice Taney, delivering the opinion of the Court, said: "The duty required by the resolution was to be performed by him (the Secretary of the Navy) as the head of one of the executive departments of the government, in the discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution are not mere ministerial duties. The head of an Executive Department, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is required from time to time to act. If he doubts, he has a right to call on the Attorney-General to assist him with his counsel; and it should be difficult to imagine why a legal adviser was provided by law for the heads of departments as well as for the President, unless their duties were regarded as executive in which judgment and discretion were to be exer-

cised. If a suit should come before this court, which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department, and if they supposed his decision to be wrong, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction and in which it is their duty to interpret the Act of Congress in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise judgment and discretion. Nor can it, by mandamus, act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties. The case, before us, illustrates these principles and shows the difference between executive and ministerial duties." And it was accordingly held that the decision of the Secretary of the Navy in that case was entirely executive and official in its character.

Sec. 258. In *Martin vs. Mott*, 12 Wheat. 19, it was held that the authority to decide whether the exigencies contemplated in the Constitution and Acts of Congress, in which the President has authority to call forth the militia to execute the laws of the Union, to suppress insurrections and repel invasions, have arisen, is exclusively vested in the President and his decision thereon is conclusive on the court and all others.

"That the power thus confided by Congress to the President is of a very high and delicate nature is conceded. A free people are naturally jealous of the exercise of military power, but it is not a power which can be executed without a corresponding responsibility and to permit the officers and militiamen to refuse to obey the order of the President, upon the ground that they thought the exigencies for calling them out had not arisen, would seriously jeopardize public interests and safety."

Sec. 259. In *Brashear vs. Mason*, 6 How. 91, which was a case for mandamus to compel the Secretary of the Navy to

audit and pay the relator's claim for services in the Navy, the court dismissed the suit and remarked: "The Secretary is obliged to inquire into the condition of the fund and the claims already charged upon it, in order to ascertain if there is money enough to pay all the accruing demands, and, if not enough, how shall it be apportioned among the parties entitled to it. These are important duties calling for the exercise of judgment and discretion on the part of the officers."

Sec. 260. In *Western Star Lodge No. — vs. Schwinke*, Postmaster, 15 Fed. Rep. 410, Judge McCreery held that an injunction would not be granted to restrain a postmaster from removing a postoffice by direction of the Postmaster-General; that the postmaster was bound to obey the orders of the Postmaster-General. The relief sought was upon the ground that a removal of the office as proposed would be in violation of a lease made by the Postmaster-General. It was held that the power to remove a postoffice from one place to another is vested by law in the Postmaster-General and can be exercised by him at his discretion.

Sec. 261. The treaty of 1819, by which Spain ceded Florida to the United States, contains the following stipulation:

"The United States shall cause satisfaction to be made for the injuries, if any, which by process of law, shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American Army in Florida."

In 1823 Congress passed an act to carry into execution this article of the treaty. The first section of this law authorizes the judges of the superior courts established at Saint Augustine and Pensacola, respectively, to receive and adjust all claims arising within their respective jurisdictions, agreeably to the provisions of the article of the treaty above mentioned; and the second section provides—

"That in all cases where the judges shall decide in favor of the claimants, the decisions with the evidence on which they

are founded shall be by the said judges reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable within the provisions of the treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged."

The Supreme Court, in construing the power thus conferred, held as follows:

"The law of 1823, therefore, and not the stipulations of the treaty, furnishes the rule for the proceeding of the territorial judges and determines their character. And it is manifest that this power to decide upon the validity of these claims is not conferred on them as a judicial function, to be exercised in the ordinary forms of a court of justice. For there is to be no suit; no parties in the legal acceptance of the term are to be made; no process to issue; and no one is authorized to appear on behalf of the United States or to summon witnesses in the case.

The proceeding is altogether *ex parte*, and all that the judge is required to do is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him or be able himself to obtain. But neither the evidence nor his award are to be filed in the court in which he presides, nor recorded there; but he is required to transmit both the decision and the evidence upon which he decided to the Secretary of the Treasury, and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge.

It is too evident for argument upon the subject that such a tribunal is not a judicial one, and that the Act of Congress did not intend to make it one. (*United States vs. Ferreira*, 13 Howard, 46)."

Sec. 262. Among the leading cases on the subject of what a judicial proceeding is and what is due process of law is *Murray and Kayser vs. Hoboken Land and Improvement Co.*, 18 How. 272. That was an action of ejectment in which both parties claimed title under Samuel Swortwout—the plaintiffs,

under a levy of an execution on April, 10, 1839, and the defendant under a sale made by the United States Marshal on the 1st day of June 1839, by virtue of a distress warrant issued by the Solicitor of the Treasury in pursuance of the Act of Congress of May 15, 1820, the date of the levy under this warrant antedating the judgment under which plaintiffs' title was made. The above cited Act gave a lien to the United States on the lands of the delinquent and defaulting Collector of the Customs from the date of the levy of the distress warrant authorized by the same Act. Swortwout was Collector of the Customs for the port of New York and his account was audited by the First Auditor and certified by the Comptroller of the Treasury; and for the balance thus found, amounting to \$1,374,119.65, the warrant in question was issued by the Solicitor of the Treasury. It would seem that Swortwout had no notice of any of these proceedings and was not heard.

The plaintiff contended that the Act of Congress, authorizing the issuance of a distress warrant without notice to the defaulting officer or giving him a hearing and a sale of his lands thereunder, was unconstitutional and void, because, 1, the proceeding was, in its nature, judicial, and hence, could not be confided to an executive officer and 2, that the warrant was not "due process of law." Mr. Justice Curtis delivered the unanimous opinion of the court. The court considered the two propositions raised, together. It was held that "due process of law" had the same meaning as the "law of the land." That the distress warrant was *legal* process was not denied, for it was issued in conformity to the Act of Congress. Was it "due process of law" within the meaning of these terms as used in the Constitution? was the question propounded and answered by the court? The court, after an historical review of the practice in England and the Colonies prior to the adoption of the Constitution, on this subject, goes on to show that there is and always has been a radical difference between the methods of ascertaining the existence and amount of debts, due by the receivers of the revenue and compelling their payment and that these methods have varied widely from the

usual course of the common law on other subjects; "and that, as respects such debts due from such officers, the law of the land authorized the employment of auditors and an inquisition without notice" and a species of execution against the body, lands and goods of the debtor to enforce payment of the amount found due. The court, in the course of the opinion, says: "That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties, the performance of which involves an inquiry into the existence of facts and the application to them of the rules of law. In this sense, the act of the President in calling out the militia, under the Act of 1795 (12 Wheat. 19), or of a commissioner, who makes a certificate for the extradition of a criminal under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. *U. S. vs. Ferriera*, 13 How. 40. It is necessary to go further and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be controversies to which the United States is a party within the meaning of the second section of the third Article of the Constitution. We do not doubt the power of Congress to provide by law that such a question shall form the subject-matter of a suit, in which the judicial power can be exerted. The Act of 1820 makes such a provision for reviewing the decision of the accounting officers of the Treasury. But, until reviewed, it is final and binding; and the question is, whether its subject is necessarily and without regard to the consent of Congress a judicial controversy. And we are of opinion that it is not. * * * The power to collect and disburse revenue and to make all laws, that shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue. * * * Its purpose is to raise money and use it in payment of the debts of the government; and, whoever may have possession of the public money, until

it is actually disbursed, the power to use those known and appropriate means continues. * * * It may be added that, probably, there are few governments which do or can permit claims for public taxes * * * to become subjects of judicial controversy according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding. * * * Though generally, both public and private wrongs are redressed through judicial action, there are more summary extra judicial remedies for both. An instance of extra-judicial redress of private wrong is the recapture of goods by their lawful owner; of a private wrong by a private person is the abatement of a public nuisance; and the recovery of public dues, by a summary process of distress, issued by some public officer authorized by law is an instance of redress of a particular kind of public wrong by the act of the public through its authorized agents. There is, however, an important distinction between these. Though a private person may retake his property or abate a nuisance, he is directly responsible for his acts to the proper judicial tribunals. His authority to do these acts depends not merely on the law, but upon the existence of such facts as are in point of law sufficient to constitute that authority; and he may be required by an action at law to prove those facts; but a public agent, whose acts, pursuant to the command of the legal precept, can justify his act by the production of such precept. He can not be made responsible in a judicial tribunal for obeying the lawful command of the government; and the government itself, which gave the command, can not be sued without his consent." The court goes on to say that "there are matters involving public rights which may be presented in such form that the court is capable of acting on them and which are susceptible of judicial determination but which Congress may or may not bring within judicial cognizance of the courts of the United States as it may deem proper. Equitable claims to land, by the inhabitants of ceded territories, form a striking instance of such a class of cases;

and as it depends on the will of Congress whether a remedy in the courts shall be allowed at all in such cases they may regulate it and prescribe such rules as they may think just and needful. Thus it has been repeatedly decided, in this class of cases, that upon their trial, the acts of executive officers, done under the authority of Congress, were conclusive, either upon the particular facts involved, or upon the whole title. *Faley vs. Harrison*, 15 How. 433; *Burgess vs. Gray*, 16 How. 48.

It is true, also, that even in a suit between private persons to try a question of private right, the action of the executive power, upon a matter committed to its determination on the Constitution and Laws, is conclusive. *Luther vs. Borden*, 7 How. 1; *Doe vs. Borden*, 15 How. 635."

Applying the principles thus laid down, the court held that the action of the executive power in issuing the warrant was conclusive evidence of the facts recited in it and of the authority to make the levy.

Sec. 263. In *Luther vs. Borden*, cited in the above case, the court, after holding that the President has the power, under the Constitution, to determine what body of men constitutes the Legislature of a State and who is the Governor of a State, when a dispute arises requiring such determination, continues: "It is said, this power in the President is dangerous to liberty and may be abused. All power may be abused, if placed in unworthy hands. * * * When citizens of the same State are in arms against each other and the constituted authority are unable to execute the laws, the interposition of the United States must be prompt or it is of little value. The ordinary course of proceedings in Courts of Justice would be utterly unfit for the crisis. And the elevated office of the President * * * and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish such strong safeguards against a willful abuse of power as human prudence and foresight could well provide."

Sec. 264. In *Doe vs. Borden*, another case cited by the court in *Murray vs. Hoboken L. and I. Co.*, the court held that a previous land grant by the sovereign, under which plain-

tiff claimed, was annulled by the treaty entered into between this country and the country whose sovereign made the grant; and that it was for the President and Senate to determine whether the sovereign (in that case the King of Spain) was authorized to annul a grant previously made by him. They having recognized that power by ratifying the treaty, the Courts of Justice were bound to so regard and treat it. The claim of the plaintiff in the case that the courts could inquire whether the President and Senate were not mistaken as to the authority of the Spanish Monarch or whether he knowingly sanctioned an act of injustice committed by him upon an individual in violation of the laws of Spain, was held to have no support in the Constitution of the United States nor in the jurisprudence of any country where the judicial and political powers are separated and placed in different hands, and the court refused to grant relief, though the contest was between private parties on both sides.

Sec. 265. An officer, to whom public duties are confided by law, is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. *Gaines vs. Thompson*, 7 Wall. 237; *Statesby vs. U. S.*, 146 U. S. 196; *Mississippi vs. Johnson*, 4 Wall. 475; *City of New Orleans vs. Paine*, 147 U. S. 261; *Noble vs. Union River Logging R'y Co.*, 147 U. S. 165.

In the *City of New Orleans vs. Paine*, *supra*, the court, in referring to *Gaines vs. Thompson*, said: "In delivering the opinion of the court, Mr. Justice Miller stated the general doctrine to be that an officer, to whom public duties are confided by law, is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining rights of parties in suits properly before them, pass upon the legality of their acts after the matter has once passed beyond their control, there exists no power in the courts by any of its processes to act

upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action."

Sec. 266. In *Philadelphia and Trenton R'y Co. vs. Stimpson*, 14 Pet. 448, the court said: "Now the objection is that the present patent does not contain any recitals that the pre-requisites thus stated in the act have been complied with, viz., that the error in the former patent has arisen by inadvertency, accident or mistake and without fraudulent or deceptive intention, and without such recitals, as in the case of a special authority, the patent is a mere nullity and inoperative. * * * Where, as in the present case, an act is to be done or patent granted upon evidence and proofs to be laid before a public officer, upon which he is to decide the fact that he has done the act or granted the patent, is *prima facie* evidence that the proofs have been regularly made and were satisfactory. No other tribunal is at liberty to re-examine or controvert the sufficiency of such proofs, if laid before him, when the law has made such officer the proper judge of their sufficiency and competency."

Sec. 267. In *Kendall vs. Stokes*, 3 How. 86, which was a case brought against Kendall for damages for official acts done by him as Postmaster-General, the Supreme Court, though it did not pass on the question directly, conceded in the argument, that such an action would lie and the case was disposed of on other grounds. The court, however, used this language: "But a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake. This was fully recognized in *Gridley vs. Lord Palmerston* (J. B. Moore, 91; B. and B. 275." The court cited also 9 Clark and Finley 251.

The court seems to have fallen into an inconsistency here, for in *Kendall vs. Stokes*, 12 Peters, 524, where the same facts were before the court, it was held that the act Kendall, as Postmaster-General, was required to perform was not a judicial

but a ministerial one and that, therefore, mandamus would lie against him to compel him to perform it.

Sec. 268. In U. S. Ex. Rel. Aaron Goodrich vs. Guthrie, 17 How. 284, which was an application for mandamus to compel Guthrie, as Secretary of the Treasury, to pay Goodrich his salary as judge of the Territory of Minnesota, the court, speaking through Mr. Justice Daniel, denied the writ and, after stating that the question presented was whether the courts of the United States possessed the power to compel the withdrawal of money from the treasury to satisfy disputed claims against the government, said: "This is the question the very question presented for our determination; and its simple statement would seem to carry with it the most startling considerations—nay, its unavoidable negation—unless this should be presented by some positive and controlling command; for it would occur *a priori* to every mind that a treasury not fenced round and shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a regime, or rather, under such an absence of all rule, would, if practicable at all, be administered not by the great departments ordained by the Constitution and laws and guided by the modes therein prescribed, but by the uncertain and perhaps contradictory action of the courts in the enforcement of their views of private interests. * * *

Thus it has been ruled that the only acts to which the power of the courts by mandamus extends are such as are purely ministerial and with regard to which nothing like judgment and discretion in the performance of his duties is left to the officer; but wherever the right of judgment or discretion exists in him, it is he and not the courts who can regulate its exercise. These are the doctrines expressly ruled by this court in the case of Kendall vs. Stokes, 12 Peters, 524; in that of Decatur vs. Paulding, 14 Peters, 497 and in the more recent

case of *Brashear vs. Mason*, 6 How. 92; principles regarded as fundamental and essential and apart from which the administration of the government would be impracticable."

Sec. 269. In *Hetton vs. Merritt*, 110 U. S. 97, the Supreme Court of the United States held that "the valuation of merchandise, made by the custom officers under the Statutes of the United States for the purpose of levying duties thereon, is, in the absence of fraud on the part of the officers, conclusive on the importer and such valuation is not reviewable in an action at law, brought by the importer to recover back duties paid under protest and that a denial of the right to bring an action at law to recover duties paid under an alleged excessive valuation of dutiable merchandise is not depriving the importer of his property without due process of law." The court further remarked: "Thus court, in referring to the general policy of the laws for the collection of the revenues, said, in *Bartlett vs. Kane*, 16 How. 263: 'The interposition of the courts, in the appraisement of importations, would involve the collection of the revenue in inextricable confusion.' And referring to section 3 of the Act of March 3, 1851 (9 Stat. L. 630), which is reproduced in section 2930, Rev. Stat., this court declared, in *Belcher vs. Linn*, 24 How. 508, that, 'in the absence of fraud, the decision of the custom officers is final and conclusive, and their appraisement in contemplation of law becomes, for the purpose of calculating and assessing the duties due to the United States, the true dutiable value of the importation. * * * Plaintiffs in error contend further that a denial of the right to bring an action at law to recover duties paid under an alleged excessive valuation of dutiable merchandise is depriving the importer of his property without due process of law and is therefore forbidden by the Constitution of the United States. The cases of *Murray's Lessees vs. Hoboken L. and I. Co.*, 18 How. 272; and *Springer vs. U. S.*, 102 U. S. 586, are conclusive on this point against the plaintiffs in error." The doctrine here announced was affirmed in *Passavant and Co. vs. U. S.*, 148 U. S. 212, *Auget vs. Hedden*, 155 U. S. 231; and *Aufmordt vs. Hedden*, 157 U. S. 310.

Sec. 270. Sections 4026 and 3990, R. S., U. S., authorize the Postmaster-General to empower special agents to make searches for mailable matter transported in violation of law, not being in a dwelling house, and authorize the agent, collector or other Custom Officer or U. S. Marshal or his deputy to seize all letters and bags, packets or parcels, containing letters which are being carried contrary to law and detain the same for two months after the final determination of all suits that may be brought against the person carrying them. These sections were involved in the case of *Blockham vs. Gresham* and others, 16 Fed. Rep. 609. The court refused to pass on their constitutionality, but remarked that "Provisions for searches and seizures to enforce revenue laws have long been familiar to the legislation of Congress; and, as Judge Cooley remarks (Cons. Lim. 304, note), 'the federal decisions go very far to establish the doctrine that in matters of revenue the regulations Congress sees fit to establish, however unreasonable they may seem, must prevail.'"

Sec. 271. *C. J. Taney, in Commissioner of Patents vs. Whitely*, 4 Wall, 522, said: "The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief and we are quite satisfied that such a power was never intended to be given them."

Sec. 272. The Comptroller of the Currency may be clothed with power to determine when a receiver of a National Bank should be appointed and the receiver may adjust claims against the bank and his decisions on these questions are conclusive against the stockholders, who have no notice and are not heard. *Kennedy vs. Gibson*, 8 Wall. 498; *Casey vs. Galli*, 94 U. S. 674; *U. S. vs. Knox*, 102 U. S. 423; and *Bushnell vs. Leland*, 17 Sup. Ct. Rep. 209.

Sec. 273. The Postmaster-General has power to discontinue a postoffice, when authorized to do so by Congress, notwithstanding the discontinuance has the effect to remove the postmaster, who has been appointed and commissioned by the President, from office. *Ware vs. U. S.*, 4 Wall. 617.

The Postmaster-General has a discretion to prescribe the time of departure and arrival of the mails. *Neil vs. Ohio*, 3 How. 720.

Sec. 274. The head of an Executive Department can not be held liable to a civil suit for damages on account of official communications made by him pursuant to an Act of Congress and in respect of matters within his authority by reason of any personal or even malicious motive that might be alleged to have prompted him. In exercising the functions of his office, he, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs, as intrusted to the executive branch of the government, if he were subjected to any such restraint. *Spalding vs. Vilas*, 161 U. S. 483.

But if he acts outside of the law or fails to comply with the law a postmaster is liable for a wrong done a citizen though he acted in good faith. This point was ruled in *Teal vs. Felton*, 12 How. 284, where it appeared the Postmaster-General had issued instructions to all postmasters to be cautious in regard to writings, on the wrappers, margins or other portions of newspapers, pamphlets and magazines sent by mail and to exclude from the mails any wrapper, etc., having a memorandum of any kind, either written or stamped or by marks or signs made in any way to give information. Teal was postmaster at Syracuse, New York. A newspaper, on the wrapper of which was an "initial" of a single letter, distinct from the address, intended for Felton, reached that city and Teal, under the above instructions of the Postmaster-General, refused to deliver it unless letter postage was paid thereon. Felton sued him in a State Court and the case finally reached the Supreme Court of the United States, which held:

1. That a single letter or initial is not a writing or memorandum within the meaning of section 30 of the Act of 1825 (4 State L. 105-111).

2. That the instructions of the Postmaster-General were not authorized by the law so far as the "initial" in this case was concerned.

3. This was not a case calling for the exercise of discretion or judgment within the rule exempting an officer from liability for a wrong done unintentionally.

4. A State Court has Jurisdiction of such case.

The court speaking of the decision in *Kendall vs. Stokes*, 3 How. 97, said:

"It is the law which gives the justification and nothing less than the law can give irresponsibility to the officer although he may be acting in good faith under the instructions of his superior of the Department to which he belongs.

Here the instructions exceed the law, as marks and signs of themselves, without some knowledge of their meaning and the intention in the use of them, are, as we have said, neither memoranda nor writings."

Sec. 275. Carrick, being the head of the family, made a settlement in person on Arsenal Island in the Mississippi river near St. Louis, erected a dwelling house thereon and inhabited it. He requested the Secretary of the Interior to have the Island surveyed and brought into the market so that he might avail himself of the rights he had acquired as such settler, under the laws of the United States. The Secretary rejected the application. He then applied to the courts for a mandamus, etc. The Supreme Court of the United States in *U. S. vs. Lamar*, 116 U. S. 423, refused the mandamus on the ground that the question submitted to the Secretary of the Interior required the exercise of judgment and discretion, and consequently his decision was final and could not be reviewed by the courts.

Sec. 276. In *United States ex rel Dunlap vs. Black*, 128 U. S. 40, it appeared that the Commissioner of Pensions, J. C. Black, had found that the relator, Dunlap, had been totally disabled by wounds and injuries received in the military service of the United States, but refused to allow him the pension, given by law, for total disability upon the ground

"that he was not on the 16th of June, 1880 (the date of the Act), receiving a pension at the rate of \$50 per month, nor was he entitled to receive a pension at the rate of \$50 per month at that date for the reason that while the degree of helplessness was that contemplated by the law the claimant himself had not made application to be rated in pursuance of the Act of June 18, 1874, but, on the contrary, had asked to be rated and had been rated at \$36 per month under the Act of February 28, 1877." Dunlap applied for a writ of mandamus to compel the Commissioner to rate him at \$72 per month, the amount authorized by law for total disability and insisted, as the Commissioner had expressly found, that he was totally disabled by wounds and injuries received in the army, the question was one purely of law involving the construction of the various acts of Congress on the subject of pensions and that it did not lie in the discretionary power of the Commissioner of Pensions to deny or in any way abridge his rights in regard to a pension. The Supreme Court, through Mr. Justice Bradley, after quoting with approval the language of Chief Justice Taney in the case of *Decatur vs. Paulding*, as above given, said: "The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where these duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all or when, by special Statute, is imposed upon them a service which they are bound to perform, without further question, then, if they refuse, a mandamus may be issued to compel them. * * * The Commissioner of Pensions did not refuse to act or decide. He adopted an interpretation of the law adverse to the relator and his decision was confirmed by the Secretary of the Interior. Whether if the law were properly before us for consideration we should be of the same opinion or of a different opinion is of no consequence in the decision of this case. We have no appellate power over the Commissioner and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official

functions. They were by no means merely ministerial acts." The writ was denied.

"It is settled that more can not be required of a public officer by mandamus than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty not to create a new one." *Ex Parte Rowland*, 104 U. S. 604.

Sec. 277. In *Dent vs. State of West Virginia*, 129 U. S. 114, *Dent* was indicted for practicing medicine without obtaining a certificate from the State Board of Health under the Statutes of that State. He had presented his diploma to such Board of Health, as required by the Statutes, but the Board had rejected it as insufficient and he was a practicing physician at the time of the passage of this Statute and had been since 1876 and he insisted that the Statute deprived him of his rights with due process of law. The court, holding this contention untenable, said: "It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law if it be general in its operation upon the subjects to which it relates and is enforceable in the usual modes established in the administration of government with respect to kindred matters, that is, by due process or proceedings adapted to the nature of the case. The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation, affecting the rights of the citizen. * * * There is nothing of an arbitrary character in the provisions of the Statute in question; it applies to all physicians, except those who may be called for a special case from another State; it imposes no conditions which can not be readily met; and it is made enforceable in the mode usually adopted in kindred matters, that is, by regular proceedings adapted to the case."

In *Choe Chan Ping vs. U. S.*, 130 U. S. 581, it was held that while the government could not deprive an alien of property, acquired by him under treaty with his government or under a law of our country, yet he could be deprived of the right to remain here by an Act of Congress

even in antagonism to a treaty. The court says: "Between property rights not affected by the termination or abrogation of a treaty and expectation of benefits from the continuance of existing legislation there is a wide difference, as between realization and hopes."

Sec. 278. In *U. S. vs. Windom*, 137 U. S. 636, it was held that a writ of mandamus will not issue to compel the Secretary of the Treasury to deliver a treasury draft for labor and material in constructing and repairing government buildings, where the draft was prepared for delivery upon condition that a part thereof should be applied to the claims of laborers and materialmen and the petitioner refuses to perform that condition, nor will the writ issue to compel the Secretary to pay a draft where his return raises disputed questions of fact and law which ought to be tried in the proceedings to obtain the writ. The action of Secretary Windom, in the case, it was held, required the exercise of judgment and discretion and was, therefore, not merely ministerial.

Sec. 279. In *Aufmordt vs. Hedden*, 137 U. S. 310, it was distinctly held that a statute, making the appraisement of the dutiable value of imported goods by appraisers, appointed for that purpose, final, was not unconstitutional. The court there said: "The proceedings for appraisal must necessarily be, to some extent, of a summary character. In *Cheatham vs. U. S.*, 85 U. S. 88, it was said by the court, speaking by Mr. Justice Miller: 'All governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes and to be rigid in the enforcement of them. These measures are not judicial nor does the government resort, except in extraordinary cases, to the courts for that purpose. The revenue measures of every civilized government constitute a system which provides for its enforcement by officers commissioned for that purpose.' * * * It was said also, in that case (p. 89) 'that the government has the right to prescribe the conditions, on which it will subject itself to the judgment of the courts in the collection of its revenues.' One of those conditions is, and always has been, that the determina-

tion of appraisers, as to the dutiable value of goods, shall be conclusive and not re-examinable in a suit at law, provided the appraisers are selected in conformity with the Statute, and, in appraising, act within the scope of the powers conferred upon them."

Sec. 280. In *Ekin vs. U. S.*, 142 U. S. 651, the court said: "And Congress may, if it sees fit, as in the Statute in question in *United States vs. Jung Ah Lung*, just cited (124 U. S. 621), authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be intrusted by Congress to executive officers; and in such case, as in all others, in which a Statute gives a discretionary power to an officer to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted. *Martin vs. Mott*, 12 Wheat. 19; *Philadelphia and T. R. Co. vs. Stimpson*, 14 Peters, 448; *Benson vs. McMahan*, 127 U. S. 457; *Otriga Y. Cortes vs. Jacobus*, 136 U. S. 330.

It is not within the province of the Judiciary to order that foreigners, who have never been naturalized nor acquired any domicile or residence in the United States nor even been admitted into the country pursuant to law, shall be permitted to enter in opposition to the constitutional and lawful measures of the legislative and executive branches of the National Government. As to such persons, the decisions of the executive or administrative officers acting within the powers expressly conferred by Congress, are due process of law. *Murray vs. Hoboken Land and Im. Co.*, 18 How. 272; *Hetton vs. Merritt*, 110 U. S. 97.

It was accordingly held that the decision of an inspector of immigration, in conformity with the Act of March 3, 1891, is final and conclusive against an alien's right to land in the United States and can not be impeached or reviewed in the Courts."

And it was held in *Yick Wo vs. Hopkins*, 118 U. S. 356, that the provisions of the Fourteenth Amendment to the Constitution of the United States are universal in their application to all persons in the territorial jurisdiction of the United States without regard to any difference of race, color or nationality.

Sec. 281. In *Fong Yue Ting vs. U. S.*, 149 U. S. 698, it was held that "the provision in the act of May 5, 1892, that any Chinese laborer found within the United States who had neglected, failed or refused to apply for a certificate of residence within one year after passage of the act, or who, after one year, shall be found in the United States, without such certificate, shall be adjudged and deemed to be unlawfully within the United States, unless he shall establish clearly to the satisfaction of the judge by at least one credible white witness, that he was a resident of the United States at the time of the passage of the act," is within the acknowledged province of every legislature to prescribe the evidence which shall be received and the effect of that evidence in the Courts of its own government. After citing *Ogden vs. Saunders*, 12 Wheat. 213; *Pillow vs. Roberts*, 13 How. 472; *125 Baskets of Champagne vs. U. S.*, 3 Wall, 14; *Ex parte Fisk*, 113 U. S. 713; *Holmes vs. Hunt*, 122 Mass. 505, in support of the above proposition, the Court continues: "The competency of all witnesses, without regard to their color, to testify in the Courts of the United States, rests on Acts of Congress, which Congress may, at its discretion, modify or repeal. Rev. Stat. ss. 858, 1977.

The reason for requiring a Chinese alien to prove the fact of his residence here at the time of the passage of the Act, 'by at least one credible *white* witness,' may have been the experience of Congress, as mentioned by Mr. Justice Field, in *Choe Ping vs. U. S.*, 'that the enforcement of former acts, under which the testimony of Chinese persons was admitted, to prove similar facts, was attended with great embarrassment from the suspicious nature, in many instances, of the testimony offered to establish the residence of parties, arising from the loose

notions entertained by the witnesses of the obligation of an oath. ”

In this same case it was held that the proceeding, before a United States Judge, as provided for in section 6 of the Act of 1892, before whom the burden was on the Chinese laborer to prove his right to remain in this country, by at least one credible white witness or else an order for his deportation could be made by the judge, was in no sense a trial for crime or offense, that the order for deportation was not a punishment for crime, nor a banishment in the sense that word is often applied to the expulsion of a citizen from his own country by way of punishment, and, in case of deportation of the laborer, he was not deprived of life, liberty or property without due process of law and that the provisions of the Constitution, securing the right of trial by jury and prohibiting unreasonable searches and seizures and cruel and unusual punishment have no application. On this point, the Court concludes as follows: “The question whether and upon what conditions these persons shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department can not properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.” In this case, it appeared that three Chinamen were arrested by the United States Marshal without warrant or other process. Two of them were taken before the United States Judge and, in one case, an order of deportation was made without a hearing or trial and, in the other case, the party showed all the facts, necessary to entitle him to remain here, but not by a credible white witness.

Sec. 282. In *Passavant & Co. vs. U. S.*, 148 U. S. 214, the question being again presented whether the Courts could review the decision of the Board of General Appraisers under the Act of June 10, 1890, as to the dutiable value of imported merchandise, the Court said: “It was certainly competent for Congress to create this Board of General Appraisers, called

'legislative referees' in an early case (*Rankin vs. Hoyt*, 4 How. 335), and not only invest them with authority to examine and decide upon the valuation of imported goods when that question was properly presented to them but to declare their decision shall be final as to the dutiable value of such merchandise against all parties interested therein. * * * In the tariff legislation of the government Congress has generally adopted means and methods for a speedy and equitable adjustment of the question as to the market value of imported articles without allowing an appeal to the Courts to review the decision reached. If dissatisfied importers, after exhausting the remedies provided by the statute to ascertain and determine the fair dutiable value of imported merchandise, could apply to the Courts to have a review of that subject the prompt and regular collection of the government's revenue would be seriously obstructed and interfered with." To the same effect is *Earnshaw vs. U. S.*, 146 U. S. 60.

In these cases it was also held that the decision of the administrative officers that an article was imported merchandise was final and conclusive on the Courts.

Sec. 283. In *Boardman vs. Thompson*, 12 Fed. Rep. 675, it was held by Mr. Justice Mathews, and concurred in by Barr, D. J., that the court had no jurisdiction to prohibit by writ of injunction a postmaster from refusing to deliver registered letters and letters containing money orders and other matter sent through the mails, on which has been prepaid the proper postage, to the party, to whom they are directed. The Justice said: "If the alleged right exists to require by judicial process the performance of such duty on the part of a public officer towards a private individual, then it is a legal right, the specific enforcement of which is the proper function of a mandamus or replevin for the recovery of the possession of the articles or an action of damages against the officer. There is no sufficient ground for the interference of equity. If, on the other hand, a postmaster is responsible only to his political superior and amenable to the laws only for such breaches of duty as it has provided, as indictment and punish-

ment and removal from office, then the present grievance is as much withdrawn from the jurisdiction of a court of equity as from the ordinary council of the common law. It is quite certain that a perpetual injunction in the terms prayed for could not be lawfully granted, for the postmaster might be lawfully required by the Postmaster-General to withhold from delivery correspondence with a named party, believed by him to be engaged in a forbidden business; and an injunction for each instance in which it might be shown that no such prohibition existed would be but an equitable replevin without the justification of preventing a multiplicity of suits."

Sec. 284. These cases go far to show that Congress may constitutionally confer power on the Postmaster-General that is conferred by sections 3929 and 4041, R. S., and the fourth section of the Act of March 2, 1895.

But the direct question of the power of the Postmaster-General under these laws has been before the Department of Justice at Washington and before the courts in several cases.

Attorney-General Mac Veagh, in an opinion given the Postmaster-General, under date of April 27, 1881 (17 Ops. Att'y-Gen. 77), speaking of the order against Dauphin, used this language:

"The power conferred upon Congress by the eighth section of Article I of the Constitution, 'to establish postoffices and postroads' and to make all laws necessary and proper for carrying into execution that power, gives full sovereign control over the whole subject, to be exercised by any appropriate means.

The Supreme Court has held the last cited section (Rev. Stat., sec. 3894, amended), excluding from the mails *all* letters, etc., concerning lotteries, to be constitutional, declaring that 'the power possessed by Congress embraces the regulation of the entire postal system of the country. *The right to designate what shall be carried necessarily involves the right to determine what shall be excluded.*' (*Ex parte Jackson*, 96 U. S. 732). * * * I conclude that if the Postmaster-General finds upon evidence satisfactory to *him*, whatever its

probative force with other minds, that Mr. Dauphin is engaged in conducting a fraudulent lottery he may and should forbid the delivery of money orders to him, and instruct postmasters to return to the senders all registered letters addressed to Mr. Dauphin.'

Sec. 285. On November 12, 1879, the Postmaster-General issued a "fraud order" under sections 3929 and 4041, R. S., U. S., against M. A. Dauphin, and, in December, 1879 Dauphin filed his bill of complaint in the Supreme Court of the District of Columbia, against the Postmaster-General, denying the facts on which the order was based, averring irreparable injury to himself and asking an injunction against the further execution of the order. The complainant contended that the action of the Postmaster-General, in issuing this order, violated the rights and privileges guaranteed to him by the Constitution of the United States. Mr. Justice Cox, delivering the opinion of the court, held, that the Constitution conferred the power on Congress to establish postoffices and post-roads, but this does not impose the duty on Congress to do this; that Congress may provide just such mail facilities as it thinks proper and may, from time to time, change and regulate the whole postal system at its discretion, as it might leave the whole work of mail communication to the States or individual enterprise. "It can not, therefore," said the court, "be said that the citizen of the United States has any absolute constitutional right, or, in other words, that it is one of the privileges of his citizenship, that his letters shall be carried by the United States, at all; and still less, that they be carried in any special manner. Whatever rights he may have in this respect exist in the discretion of the Legislature and are entirely different from those fundamental rights to life, liberty and property, which are secured by the Constitution. Since then, Congress may or may not, in its discretion, provide a postal system for public convenience, it is difficult to say what conditions it may not impose to its use and enjoyment. * * * But, while the absolute right of the citizen to have this business convenience provided for him can not be maintained, it may be

said the right exists under the Constitution conditionally; that if Congress shall once exercise its discretionary power, it can not discriminate between persons or classes of persons; it must legislate for all alike; all the citizens of the United States have a constitutional right to equal participation in the benefits of legislation and the use of any instrumentality created by it, unless, at least the exclusion be imposed by way of punishment for crime and that, after due conviction only; and that any condition, destructive of this equality, is repugnant to the spirit of the Constitution." The learned Justice then goes on to show that while, theoretically, the principle of equality underlies all republican government, yet, when the principle is applied in practice, we find it can be accepted only with distinctions and qualifications. He gives, as instances, the granting of the franking privilege to a few, to the granting of pensions, in the imposing of discriminating duties on imports to encourage home enterprise, by which one class of importers bears burdens not imposed on others, in issuing bonds exempt from taxation and excluding some citizens from the franchise.

The Slaughter House cases, 16 Wall, 36, were referred to as another instance, where the Supreme Court of the United States held that persons and property can be subjected to all kinds of restraint and burdens in order to secure the general comfort. Justice Cox then argues that the legislation in question authorized the Postmaster-General to refuse to deliver registered letters to parties whom he found to be operating lottery and fraudulent schemes, in the interest of public morals, and because it is almost if not quite impossible otherwise to prevent this public convenience from being made an instrument of corruption and adds that "if it be shown * * * that the rule of equality can be departed from on any ground, it is impossible to deny that it may be, when this is deemed necessary by Congress, to prevent a great evil and to prevent what is designed for a blessing from being converted into a curse. * * * The application of the principle of equality to this case would be that Congress has no right to provide these special mail facilities for the innocent without, at the

same time, conceding them to notorious and professional wrongdoers, to whom they would afford the most powerful agency for wrong doing and that the latter must have the same use of the federal agency as others, until accident shall betray their abuse of it and this shall be followed by judicial conviction. We can not believe that the Government is bound to such an inflexible rule of equality as will involve these results. The right of every citizen to the benefit of the discretionary legislation of Congress must be subject to the necessity of public health, morals, order and the general welfare and the efficient execution of the powers expressly conferred by the Constitution. It was also contended by Dauphin, that to deny a citizen the benefits of any Act of Congress, especially on the ground that he is engaged in an unlawful occupation, is punishment, and that to authorize the Postmaster-General to execute the provisions of the law in this respect is to authorize the infliction of this punishment without due process of law in defiance of the guarantees of the Constitution, and is equivalent to investing the Postmaster-General with judicial power, which can only be lodged in the courts. The court, in answer to this contention, discusses the difference between fundamental rights and privileges conferred by legislation. The right to life, liberty and property is held to be fundamental, inalienable and antedating all constitutions and this right is what the Constitution protects. Congress might repeal the whole law relating to the registration of letters or might authorize the Postmaster-General to suspend or abolish the system when he should think the privilege was abused by disseminating immoral matter, and, in that case, it could not be claimed that the people generally were deprived of any property in a privilege that might, at any time, be withdrawn by Congress. "If the repeal of this law could not be held to deprive the people generally of their property without due process of law then the withdrawal from complainant of the right to receive registered letters, even supposing him to have been previously entitled to it, under the law, can not be said to have

such effect as to him, unless such effect be found in the mere fact of discrimination against him. Whether this be so will depend upon the question already discussed, viz.: Whether the complainant has a constitutional right to the privilege of the registry system simply because others have it. For if he has not, as we think has been sufficiently shown, then the withdrawal of the privilege from him while others still retain it does not deprive him of any property in the constitutional sense of the term."

The distinction between absolute rights and mere legislative privileges is brought out in the franchise cases, *Anderson vs. Baker*, 23 Md., 531 and *Blair vs. Ridgely*, 41 Mo. 63. In these and other cases it is held that the right to vote is not protected by the Constitution of the U. S. but it is exclusively within the control of the State and may be enlarged or contracted at the pleasure of the State.

Justice Cox says: "The terms 'due process of law,' as employed in the Constitution, apply only to the fundamental rights referred to in that instrument and are inapplicable to mere privileges of legislative creation. As to these the law of England furnishes no precedent, but the law of their creation, determines the terms and conditions of their enjoyment and by what process they shall terminate.

The objection that the statute under consideration attempts to clothe the Postmaster-General with judicial power is mainly founded upon the assumption, which we consider erroneous, that his action in pursuance of it is virtually a trial and penal judgment against the party affected by it. But if it be not so, as has been shown, there is no ground for the objection. There is probably not an important office in the Executive Departments in which it is not necessary to exercise judgment in such a manner as to affect private interests in carrying the laws into effect, and yet that this is the exercise of judicial power of the United States, which belongs only to its courts, has not been pretended."

The court further held, in that case, that the issuance of the order did not inflict punishment on Dauphin, but was pre-

vention, resorted to, because of the difficulty or impossibility of detection. Its object is plainly not to *punish*, but to preserve the mails from misuse. *Dauphin vs. Key*, 4 *McArthur*, 203.

Sec. 236. The case of the New Orleans National Bank vs. Merchant, 18 Fed. Rep. 841, was decided by Judge Pardee in the Circuit Court, Eastern District of Louisiana in January, 1884. Plaintiff applied for an injunction to restrain defendant from refusing to deliver to it registered letters addressed to it and to pay money orders in its favor. The defendant set up as a defense an order of the Postmaster-General directing him to deliver to plaintiff "no registered letters and redeem no money orders payable to it," but in that order there was no finding that plaintiff was then conducting through the mails any lottery scheme or scheme to defraud. The Judge granted the injunction and after referring to the decision in *Dauphin vs. Key*, *supra*, decided "that the foregoing statute giving authority to the Postmaster-General to determine upon evidencesatisfactory to him whether any person engaged in one of the schemes or enterprises described therein and thereupon to forbid the use of the registered letter and money order systems is constitutional. * * * To this I agree and I refer to the learned opinion rendered in that case by Justice Cox, as the organ of the court, as an answer to all the arguments addressed to me on this hearing on the constitutionality of said laws. Every point raised here on that question seems to have been passed on by Justice Cox."

The Judge then proceeded to the discussion of the question whether the court can in any case grant relief against the action of the postal authorities, and he comes to the conclusion that it can. He found that the order issued by the Postmaster-General, in the case, did not, in essential particulars, comply with the law and for that reason it constituted no justification to the defendant to refuse to deliver registered letters and pay money orders to plaintiff. He relied mainly on the opinion of the Supreme Court of the United States in *Teal vs. Fetter*, 12 How. 284.

The Judge, in this case, also held that "the fair import of the law is that a deprivation of the registered letter and money order system shall only continue while the offending party is engaged in one of the schemes or enterprises described in the Statute and, while the Postmaster-General is satisfied he is so engaged. * * * When Postmaster-General Key ceased to be satisfied on the evidence submitted * * * it was his duty to revoke the order."

Sec. 287. In *Enterprise Savings Association vs. Zumstein* (67 Fed. Rep. 1000), the plaintiff being one of the so-called bond investment companies, the power of the Postmaster-General to issue fraud orders was upheld, the circuit court of appeals (composed of Taft and Lurton, circuit judges, and Severens, district judge), saying:

"It must follow from the exclusive and absolute power of Congress over the whole subject of what may be carried and what may be excluded from the mails that it was entirely within its competency to confer authority upon the head of the Postal Department to direct a postmaster to refuse the delivery of registered letters addressed to a person or corporation which was engaged in conducting a lottery enterprise through the use of the registered letter department, or to forbid the payment of a postal money order drawn in favor of one engaged in conducting such a business by means of the assistance of that department of the postoffice, and that he might make such order upon evidence satisfactory to him. Neither the making of such an order, nor its enforcement, required or permitted the opening of any such registered letter, and the statute expressly prohibits the opening of any letter by the postmaster not addressed to himself. Neither of those departments of the postal service are essential to the ordinary use of the mails, and Congress has reposed in the Postmaster-General an unlimited discretion as to when and where he would extend the facilities afforded by those departments. (Rev. Stat., secs. 3929, 4041). We see no reason why Congress may not confer on him authority to prevent the use of those facilities by any person engaged in using them for the propagation of a business

deemed by it vicious and not entitled to such special facilities in the extension and conduct of such schemes. The authority to inhibit the use of those postal facilities had to be vested somewhere. It was a matter pertaining to executive business, and was therefore imposed upon the executive head of the Postal Department. In the case of *Commerford vs. Thompson and Bank vs. Merchant*, heretofore cited, the power of Congress to vest such an authority in the Postmaster-General was not questioned, but admitted by both Judges Brown and Pardee. The whole question was elaborately considered in *Dauphin vs. Key* (4 McArthur, 203)."

Judge Thomas, in the case brought by the Tontine Savings Association at St. Paul, Minn.; Judge Phillips, in the case of the Pettis County Bond and Investment Company at Jefferson City, Mo., and Judge Newman, in the case of the Equitable Loan and Security Company at Atlanta, Ga., upheld the power to issue such orders.

The case of *Commerford vs. Thompson* (1 Fed. Rep. 417), is not in conflict with the above cases. The court there was dealing with ordinary mail matter long prior to the Act of March 2, 1895, and its ruling is precisely in line with the practice of the Department until after the passage of that Act.

Sec. 288. The second question presented for discussion under this head is whether the effect of the power, conferred on the Postmaster-General by the fourth section of the Act of March 2, 1895, is to deprive citizens of their property or liberty without due process of law.

The foregoing rulings and decisions were made upon the Statutes as they existed prior to the enactment of the fourth section of the Act of March 2, 1895, and those, who wish to operate lottery and fraudulent schemes through the mails, have not abandoned their contention that the above cited Act is unconstitutional because it deprives the party against whom a "fraud order" may be issued of the ordinary as well as extraordinary facilities of the mail service and they

seize upon what is said in the Dauphin and Zumstein Cases about the extraordinary facilities afforded by the Registry and Postal Money Order Systems of the Postoffice Establishment, upon which to base an argument for a distinction between these extraordinary facilities and the use of the mails in the transmission of ordinary matter. The courts, in the above cases, were speaking of the *policy* and not of the *power* of Congress in the enactment of these laws, as they existed at the time the decisions were rendered. The principle laid down by the courts in those cases apply with equal force, if not greater force, to the power conferred on the Postmaster-General by the fourth section of the Act of March 2, 1895 and the distinction attempted to be made between an order forbidding the delivery of registered letters and the payment of money orders and one forbidding the delivery of any mail matter whatsoever is not well founded.

Sec. 289. It is contended that while Congress may confer on the Postmaster-General power to issue an order depriving a citizen of the use of the Registry and Money Order Systems of the Postal Establishment, it can not confer power on that officer to deprive a citizen of the use of the mails in sending and receiving ordinary mail matter on the ground that the Registry and Money Order Systems being extraordinary mail facilities there is a difference in the right or liberty to use the mails for them and to use the mails for the transmission of ordinary mail matter. But there is no difference in principle.

Sec. 290. The right to use the mails at all is not inherent, inalienable, but is subject to the control of Congress. The right is statutory only and it must be exercised subject to all the reasonable conditions prescribed by Congress. The right to use the mails for ordinary mail matter is as much a statutory right as is the use of the Registry and Money Order Systems; and it seems evident the power to deprive a citizen of one necessarily implies the power to deprive him of the other. It is argued that while Congress possesses the power to authorize the Postmaster-General to deny the use of the mails for the dissemination of the prohibited matter, it can not authorize

him to refuse the use of the mails for the transmission of legitimate matter. So far as open or unsealed matter is concerned this is true. The Postmaster-General does not claim to have the power nor does he exercise the power to refuse to deliver legitimate matter when not under seal to a party though he has found that such party is conducting a lottery or fraudulent scheme through the mails. But when it comes to sealed matter the rule is different. As, has been seen, the Postoffice Department regards the seal of a letter or a packet as sacred and the Postmaster-General has no authority by law to break it to see what it covers and this being true, the only way left for him to act in regard to sealed matter, addressed to the operator of a fraudulent or lottery scheme, is to refuse to deliver any of it. But because some of it may contain unobjectionable matter, the power of the Postmaster-General to refuse to deliver any of it is denied. But the power, as has been said, to refuse to deliver registered letters or pay money orders necessarily implies the power to refuse to deliver ordinary mail. The principle in both cases is precisely alike, except probably that the power to refuse to deliver registered letters or pay money orders stands on less solid ground than the power to refuse to deliver ordinary mail matter, because in the former, money or property is involved and the right to such matter is, in the strict sense, a property right, while as a rule in the other class property rights are not directly involved. It matters not, however, whether any such difference exists or not and the subject may be treated on the broad ground that the right in each case is the same in principle. In both cases the matter is sealed and is not therefore open to the inspection of the postmaster and as a registered letter *may* contain matter, money or property pertaining to a perfectly legitimate transaction, and as a money order, which the postmaster sees, may be in payment of an honest debt or for the purchase of some article of merchandise, it would seem to follow as a necessary consequence that if the power to refuse to deliver such registered letter or pay such money order which may relate to one of the prohibited schemes, on the ground that the Postmaster-

General has found, on evidence satisfactory to him, that the party, to whom the one is addressed and the other is payable, is engaged in conducting such scheme through the mails be a valid power, the power to refuse to deliver ordinary mail matter, under like conditions, can not on principle be denied. But Judge Barr apparently made this distinction in *Hoover vs. McChesney*, 81 Fed. Rep. 472. The learned Judge in that case in order to escape the precedent of the *Zumstein* case made also a distinction between the right of an individual and of a corporation under the Fourteenth Amendment to the Constitution. He decided that the Postmaster-General had the power to issue an order against a corporation under the fourth section of the Act of March 2, 1895, but that section, so far as it authorized an order against an individual citizen, was unconstitutional and void. In this the judge was clearly in error.

Sec. 291. The Supreme Court of the United States in *Covington and L. T. Co. vs. Sandford*, 164 U. S. 578, and *Ry. Co. vs. Mathews*, 165 U. S. 150, held distinctly that corporations are persons within the meaning of the constitutional provision forbidding the deprivation of property or liberty without due process of law as well as a denial of the equal protection of the laws. And in *Fairfield Floral Co. vs. Bradbury*, 89 Fed. Rep. 393, Judge Putnam, in commenting upon the above case, disposes of this position of Judge Barr by saying that he could not assent to the refinement made by the judge in that case that the decision of the Court of Appeals in *Association vs. Zumstein*, 67 Fed. Rep. 1000, involved any distinction between an individual and a corporation, but he apparently held that Congress had no power to authorize the Postmaster-General, by fraud order, to deprive an individual or corporation of the ordinary use of the mails for legitimate purposes, though he may, under the statutes, deny them the privileges of the registered letter or money order departments.

And then Judge Putnam proceeded to dismiss complainant's bill for an injunction to restrain the enforcement of a fraud order issued by the Postmaster-General forbidding the delivery to him of ordinary mail matter, as well as registered

letters, on the ground that he had failed to allege or show that his business was legitimate and remanded him to his remedy at law. It is not clear what was intended to be decided in this case; but it appears the judge followed the ruling in *Commerford vs. Thompson*, 1 Fed. Rep. 417 (though that case was not cited), where it was held that before a party can have an injunction he must come into court with clean hands and a party seeking to enjoin the postal officials from interfering with his mail matter must allege and prove that the matter attempted to be interfered with does not concern any of the prohibited schemes.

In this case the judge apparently makes the distinction between the right to use the registry and money order systems and the use of the mails for ordinary purposes, which has been shown not to exist.

The remanding of the party to his remedy at law, however, indicates that the court thought the statute, so far as it clothed the Postmaster-General with the power to refuse to deliver ordinary mail matter, is unconstitutional. There is another reason why we may infer the court must have thought the statute unconstitutional and that is he intimated that if the plaintiff had alleged and proved that his business was legitimate he would have granted the injunction, as he could not have interfered with the duties of the Postmaster-General upon any other theory than that the law, under which he claimed to act, is unconstitutional, it being well settled that the courts have no right to interfere by mandamus or injunction with the ministerial and official duties conferred on one of the Executive Departments of the Federal Government. The cases above reviewed show this conclusively.

The learned judge in this case seems to have overlooked the fact that the law under which the "fraud order" in the *Zumstein* case was issued did not authorize the refusal to deliver ordinary mail matter. The order in that case was issued prior to the passage of the Act of March 2, 1895, and hence the power conferred by that act was not involved, discussed or decided.

Sec. 291a. Another contention of the promoters of lottery and fraudulent schemes and which Judge Barr sustained in the Hoover case is that as some of the sealed matter addressed to the parties against whom fraud orders are issued can not be returned to the senders because their names are unknown and hence must be sent to the Dead Letter Office and opened, the orders in question authorize an "unreasonable seizure and search" of the private papers of the citizen. This is an entire perversion of the words "seizure and search" as used in this connection in the Constitution. The Government, as a common carrier of mail matter, under the laws of Congress, finds certain letters and packets in the mails, which it can not deliver and which it refuses to deliver, and it returns them to the senders, if known by matter on the envelopes or wrappers, and if not thus known, it takes the only other recourse it has left, and that is to send them to the Dead-Letter Office, with directions to open them, get the senders' names, and return to them. This Department has always held that a letter opened in the Dead-Letter Office is still constructively under seal, and hence there is no prying into mail matter nor any attempt made to detain or confiscate its valuable contents, but the object and the only object is to return it to the sender, and all this is done for the latter's benefit. Hence there can be no "seizure or search" within the meaning of the Constitution, in the enforcement of these laws.

In no single instance has the Department used matter opened in the Dead-Letter Office, either under the general regulations of the Department or under the operation of fraud orders, as evidence in any civil or criminal prosecution against the sender, or otherwise.

Sec. 292. But as opposed to the Hoover and the Fairfield Floral Co. cases we have the opinion of Attorney-General Harman and a ruling by Judge Grosseup of Chicago.

Fraud orders were issued against the Pettis County Bond Investment Co., and others, under the fourth section of the Act of March 2, 1895, and Attorney-General Harman after

a most exhaustive argument on the constitutionality of that section on the appeal of such companies said:

"These acts were within the constitutional authority of Congress, and empower you to deny all mail facilities to those whom you may find to be engaged in any of the classes of business described. (*Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110)."

Sec. 293. In *Lansing and Co. vs. Hessing*, postmaster at Chicago, in a proceeding commenced before Judge Grosscup in September, 1896, the plaintiffs applied for an injunction to restrain the defendant from retaining and refusing to deliver letters addressed to them. The defendant as a defense set up a "fraud order," issued by the Postmaster-General under the Act of March 2, 1895, directing him to refuse to deliver ordinary mail matter as well as registered letters to plaintiffs on the ground that the Postmaster-General found they were conducting a scheme to defraud through the mails. At the trial plaintiffs insisted: 1. That the Act of March 2, 1895 (28 Stat. L. 963), enlarging the powers of the Postmaster-General, applied only to those operating lottery schemes through the mails. 2. That the Acts of September 19, 1890 (26 Stat. L. 465), and the Act of March 2, 1895, *supra*, were unconstitutional because they deprived plaintiffs of their property without due process of law.

These contentions were overruled by the court and the bill for injunction was dismissed October 29, 1896. No opinion of Judge Grosscup in the case was filed and the reasons given for the action taken can not be given more fully.

THE NATURE OF THE RIGHT OF A CITIZEN TO USE THE MAILS.

Sec. 294. It should be conceded at the threshold, that this is a valuable right within the protection of the Constitution of the United States. That it is a statutory right, however, is plain and the citizen must exercise the right subject to all the reasonable conditions and restraints Congress may prescribe. It has been shown that the right to the use of the ordinary mail facilities is the same as that to the use of the extra-

ordinary. Judge Barr in the Hoover case calls it a property right. This is not strictly true, but it is rather a "liberty" within the meaning of the Fourteenth Amendment to the Constitution. That is what Judge Story calls this right (Story on the Constitution, 4 Ed., sec. 1937), and that is what the Supreme Court of the United States calls it in *Allgeyer vs. State*, 17 Sup. Ct. Rep. 427; 165 U. S. 578. The right to the use of the mail service being of this character a citizen can not be deprived of it except by due process of law nor can Congress pass any law which does not apply alike to all similarly situated.

"Due process of law" is equivalent to "Law of the Land."

Assuming that it has already been shown that the Postmaster-General in executing the function conferred on him by sections 3929 and 4041 and section four of the Act of March 2, 1895, exercises discretion and judgment and hence is not subject to the control of the courts, the only phase of the question, that it is necessary now to examine is whether the order authorized by this statute is "due process of law" or is issued according to the "law of the land."

The main argument made by Judge Barr, in the Hoover case is that the law does not provide for notice and a hearing before the "fraud order" is issued. In many of the cases already cited it was held that in the administration of the law by the Executive Department notice to the party to be effected and a hearing before action is not necessary even in cases involving unquestioned rights of property. In countless instances parties are deprived of their liberty and at least the use of their property without notice or a hearing. Parties may be imprisoned and are imprisoned upon warrants issued upon an affidavit made by a private individual or by the *ex parte* action of an official or a grand jury without a hearing and so have parties been deprived of the temporary use of their property by a writ of replevin issued in the same way without notice and private papers have been seized upon like *ex parte* process. In all these cases and in many more that might be mentioned the courts in England and America have never hesitated to

hold such process "due process of law" or process according to the "law of the land." It is true in these cases the parties had a right to appear afterwards and contest the matter but yet the fact remains that they had suffered a deprivation of their liberty or the use of their property or had been subjected to having their premises searched and their private papers seized in the meantime, without in the first instance having had notice or a hearing. But in some of the cases, heretofore cited, and in cases yet to be cited, the Supreme Court of the United States held that the action of the Executive Department of the Government is final and conclusive upon the courts, though no notice was given in the first instance nor any hearing had or allowed afterwards. But a distinction must be noted here between a liberty or property right touching a legitimate matter and such liberty or right when it relates to matter deemed injurious to the public morals or health. In the latter case the liberty or right is not within the protection of the Constitution of the United States. This is shown beyond question by the following cases.

Sec. 295. A statute of New York provided that all tenement houses should be furnished by the owners with sufficient Croten or other water on each floor occupied or intended to be occupied whenever they shall be directed so to do by the Board of Health and a penalty for failure to comply with such order was imposed. In *Health Department vs. Rector*, 145 N. Y. 32, it was sought to recover the penalty against the defendant for failing to comply with the order of the Board in regard to two houses which had been erected prior to the passage of the statute. Among other things the defendant contended that the order of the Board of Health was made without notice and that, as it could not be complied with, except by the expenditure of a considerable amount of money the result would be to deprive the defendant of its property without a hearing and an opportunity for what defense it might have, and that, in fact, it deprived the defendant of its property without due process of law. The Court of Appeals of New York, speaking through Peckham, J., said: "There was no arrangement in either of

these houses in question for the supplying of the Croten or other water to the occupants of each floor at the time when the order of the Board of Health was made; such order therefore could not be complied with on the part of the defendant without the expenditure of money for that purpose. That fact must be assumed, and, even upon that assumption, we do not think the act invalid on the alleged ground that it deprives the defendant of its property without due process of law. The act must be sustained, if at all, as an exercise of the police power of the State. * * * Assuming that this act is a proper exercise of the power, in its general features, we do not think that it can be regarded as invalid because of the great fact that it will cost money to comply with the order of the Board for which the owner is to receive no compensation or because the Board is entitled to make the order under the provisions of the act without notice and a hearing of the defendant. As to the latter objection it may be said that in enacting what shall be done by the citizen for the purpose of promoting the public health and safety it is not usually necessary to the validity of the legislation upon that subject that the party shall be heard before he is bound to comply with the direction of the legislature. *People vs. Board of Health*, 140 N. Y. 1, 6. The legislature has power and has exercised it in countless instances to enact general laws upon the subject of the public health and safety without providing that the parties, who are to be affected by those laws, shall first be heard before they shall take effect in any particular case. * * * The fact that the legislature has chosen to delegate a certain portion of its power to the Board of Health and to enact that the owners of certain tenement houses should be compelled to furnish this water after the Board of Health had so directed, would not alter a principle nor would it be necessary to provide that the Board should give notice and afford a hearing before it made such order. I have never understood that it was necessary that any notice should be given under such circumstances before the provisions of this nature could be carried out."

The opinion of Justice Peckham in this case is most exhaustive and it was held that the act in question was a reasonable exercise of the police power of the State. Judge Bartlett dissented but not on the ground that notice and a hearing were necessary but on the ground that the exercise of power in such a case was unreasonable and oppressive.

Sec. 296. "Regulations for the preservation of the health, morals and welfare of the people may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon anyone but to promote with as little individual inconvenience as possible the general good; and the 14th Amendment does not apply to the exercise of the police power of the State. The inconvenience arising in the administration of police laws are matters entirely for the consideration of the State; they are to be remedied only by the State." *Barbin vs. Connolly*, 113 U. S. 27.

Sec. 297. In excluding various articles from the mail the object of Congress has not been to interfere with the rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals. *Ex parte Doran*, 32 F. R. 76.

Sec. 298. In *Powell vs. Pennsylvania*, 127 U. S. 678, a statute, making it unlawful to manufacture or sell oleomargarine altogether, was upheld though it was offered to be shown that that article, if properly made, was a wholesome food. Mr. Justice Harlan, delivering the opinion of the court, used this language: "If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing or selling *wholesome* oleomargarine as an article of food, their appeal must be to the legislature or to the ballot box and not to the judiciary."

Sec. 299. The Supreme Court of the United States in *Lawton vs. Steele*, 152 U. S. 132, 135, lays down the rule, in regard to the exercise of the police power, in the following terms: "It (the police power) is universally held to include everything essential to the public safety, health and morals

and that the State may interfere wherever the public interests demand it and, in this particular a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, *but what measures are necessary for the protection of such interests.* *Barbin vs. Connelly*, 113 U. S. 27; *Kidd vs. Pearson*, 128 U. S. 1. To justify the State in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals." In this case, where a fishing net had been summarily destroyed without a hearing under a statute of New York, the court went on to say that the "legislature, however, undoubtedly possessed the power not only to prohibit fishing in these waters, but to make it a criminal offense and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually than by destroying the means of committing the offense. If the nets were being used in a manner detrimental to the public, we think it was within the power of the legislature to declare them to be nuisances and to authorize the officers of the State to abate them. * * * While the legislature has no power to arbitrarily declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed. *Newark and S. O. H. C. R. Co. vs. Hunt*, 50 N. J. L. 308; *Blazin vs. Miller*, 10 Hun. 435; *House's case*, 12 Coke, 62; *Stone vs. New York*, 25 Wend. 173; *American Print Works vs. Lawrence*, 21 N. J. L. 248; 23 N. J. L. 590."

And, in another place, the Court said: "An act of the legislature, which has for its object the preservation of the public interests against illegal deprivation of the rights of pri-

vate individuals ought to be sustained unless it is plainly violative of the Constitution or subversive of private rights."

Sec. 300. The Supreme Court of the United States in *Crowley vs. Christensen*, 137 U. S. 86, 94, said: "There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit, to the utmost, its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers, as it may deem proper, the power of passing upon applications for permission to carry it on, and to issue a license for that purpose. It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom and justice to the parties affected. But that is a matter which does not affect the authority of the State or one which can be brought under the cognizance of the Courts of the United States."

Sec. 301. In *Mugler vs. Kansas* and *Kansas vs. Ziebold*, 123 U. S. 623, a statute of Kansas, prohibiting the manufacture or sale of intoxicating liquors as a beverage and declaring all places where such liquors were manufactured or sold in violation of the statute to be common nuisances and prohibiting their future use for the purpose, was held to be a valid exercise of the police power of the State, even as applied to persons who, long before the passage of the act, had constructed buildings specially adapted to such manufacture and of but little value for any other object. It was held, in that case, that the state could lawfully prohibit the manufacture of liquors for one's private use, if such manufacture was deemed prejudicial to the rights and interests of the community and that the power to determine what was prejudicial to society was lodged in the legislature.

Sec. 302. The police power extends not only to things intrinsically dangerous to the public health or injurious

to the public morals, such as infected rags or diseased meat, but to things which, when used in a lawful manner, are subjects of property and commerce and yet may be used so as to be injurious or dangerous to the life, health, or the morals of the people. Gunpowder is a subject of commerce and of lawful use, yet, because of its explosive and dangerous qualities, all admit that the State may regulate its keeping and sale. Liquor, bottles, glasses and other utensils used in connection with liquor, and fishing nets, are articles of legitimate use in some respects and yet, they may be lawfully destroyed as constituting nuisances because they may be put to uses injurious to the health and morals of the people. *Mugler vs. Kansas, supra.*

Sec. 303. In *Fertilizing Co. vs. Hyde Park*, 97 U. S. 659, the Company had been granted a charter by the State of Illinois for the purpose of converting, by chemical process, the dead animal matter of the slaughter houses of Chicago for fifty years.. The company, under the charter, erected buildings and appliances costing \$200,000. The village of Hyde Park, where the establishment was located, passed an ordinance, authorized by the law of the State, prohibiting any one from carrying on any unwholesome or offensive business or establishment within the limits of the village, or to transport offal through it. The Court held that the property was erected and the money invested subject to the future exercise of the police power of the village, acting under state authority. The effect of this ruling was to substantially destroy the value of the property of the company before the expiration of its charter.

Sec. 304. In *Boston Beer Company vs. Massachusetts*, 97 U. S. 25, the Supreme Court of the United States, affirming the judgment of the Supreme Judicial Court of Massachusetts, held that a statute of the State, prohibiting the manufacture and sale of intoxicating liquors, applied to a corporation which the State had long before chartered and authorized to hold real and personal property for the purpose of manufacturing such liquors. Among the reasons assigned by the Court for

its judgment were the following: "If the public safety or the public morals require the discontinuance of any manufacture or traffic the hand of the legislature can not be staid from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State. Whatever differences of opinion may exist as to the extent and boundaries of the police power and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens and to the preservation of good order and the public morals. The legislature can not, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim *salus, populi suprema lex*; and they are to be attained and provided for as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

Sec. 305. The State of Mississippi, by an act passed by the legislature, January 16, 1867, authorized the Mississippi Agricultural, Educational and Manufacturing Aid Society to dispose of lands and other property by the casting of lots, by chance or otherwise, for a period of twenty-five years, for which privilege said Society paid the State \$5,000 and agreed to pay the sum of \$1,000 annually, and "one-half of one per cent on the amount of receipts derived from the sale of tickets," and did pay these sums for some time.

In 1868 the State, by a Constitutional provision, prohibited the legislature from authorizing any lottery and declared that any lottery theretofore authorized should not be permitted to be drawn, or tickets therein sold. By an act of the legislature passed in 1876 enforcing the provisions of the Constitution, it was made unlawful to conduct any lottery in the State.

The validity of the constitutional provision and the act of 1876 as to the said society was brought in question in the case of *Stone vs. State of Mississippi*, 101 U. S. 814. The chief justice, in delivering the opinion of the court, said: "All

agree that the legislature of the State can not bargain away the police power of the State. 'Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.' *Metropolitan Bd. of Excise vs. Barin*, 34 N. Y. 657; *Boyd vs. Alabama*, 94 U. S. 645, Many attempts have been made in this court and elsewhere to define the police power but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the power itself which will be, in all respects, accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. *Beer Co. vs. Massachusetts*, 97 U. S. 25; *Patterson vs. Kentucky*, 97 U. S. 501. Neither can it be denied that lotteries are proper subjects for the exercise of the power. We are aware, that, formerly, when the sources of the public revenue were fewer than now, they were used in some or all of the States, and even in the District of Columbia, to raise money for the erection of public buildings, making public improvements and not unfrequently for educational and religious purposes; but this Court said more than thirty years ago, speaking through Mr. Justice Grier, in *Phalen vs. Virginia*, 8 How. 163, that 'experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; and it plunders the ignorant and simple.' * * * No legislature can bargain away the public health or the public morals. The people themselves can not do it, much less their servants. * * * The contracts, which the Constitution protects, are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental

from property rights a particular right is to be put; but, in respect to lotteries, there can be no difficulty. They are not, in the legal acceptation of the term, *mala in se*, but, as we have just seen, may properly be made *mala prohibita*. They are a species of gambling and wrong in their influences. They disturb the checks and balances of a well ordered community. Society, built on such a foundation, would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what 'by the casting of lots or by lot, chance or otherwise' might be awarded to them from the accumulations of others. Certainly the right to stop them is governmental, to be exercised at all times by those in power at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity and through their properly constituted agencies, may revoke it at any time when the public good shall require it and this whether it be paid for or not. * * * He has in legal effect nothing more than a license to continue on the terms named for the specified time, unless sooner abrogated by the sovereign power of the State. It is a permit good as against existing laws, but subject to future legislative and constitutional control or withdrawal."

This case has been lately affirmed and the reasoning therein employed has been approved by the Supreme Court of the United States, in *Douglass vs. Kentucky*, 168 U. S. 488, which is a case in all respects similar to it.

In this case it appears that in 1838 the legislature of Kentucky granted the privilege to certain parties to raise money by lottery for the benefit of the city schools of Frankfort, and in 1872 the act was amended so as to allow the board of councilmen of the city of Frankfort to sell and convey the privileges, granted for the purposes mentioned, and Douglass in 1875 purchased all the lottery franchises and privileges conferred by the act of 1838 and also by an amendatory act of 1869. The scheme devised by the city of Frankfort and which it sold to Douglass consisted of 30,900 classes. In consideration of the sale of this scheme Douglass agreed to pay to

the city various sums at stated times and executed a bond in the sum of \$100,000 conditioned for a faithful compliance with the provisions of the various acts of the legislature, under which the lottery was operated and for the payment of all sums stipulated to be paid to the city as well as all prizes drawn in any class under such lottery scheme. By the act of March 22, 1890, the legislature of Kentucky repealed the charter of the Frankfort lottery and by the constitution of Kentucky of 1891 all lotteries were prohibited.

The court held the act of 1890 constitutional and that it did not impair the obligation of the contract Douglass had with the city of Frankfort within the meaning of the contract clause. of the Constitution of the United States.

Sec. 306. But it was held in *New Orleans vs. Houston*, 119 U. S. 265, that, where the right to operate a lottery is given by the provisions of the State Constitution to a corporation, the legislature can not abrogate the right. The Court said: "It is undoubtedly true that no rights of contract are or can be vested under this constitutional provision, which a subsequent constitution might not destroy without impairing the obligation of a contract within the sense of the Constitution of the United States, for the reason assigned in the case of *Stone vs. Mississippi* (101 U. S. 814). But an ordinary act of legislation can not have that effect because the constitutional provision has withdrawn from the scope of the police power of the State to be exercised by the General Assembly the subject-matters of the granting of lottery charters so far as the Louisiana State Lottery Company is concerned and any act of the legislature contrary to this prohibition is upon familiar principle null and void."

Sec. 307. It may very well be asked what notice Mugler, Stone, the Fertilizing Co. and the Boston Beer Co. had before or after their property was destroyed by State legislation and property too that had been acquired under valid laws, enacted by state authority? If property and rights acquired under affirmative legislation of the lawmaking power can be destroyed without notice or a hearing, *a fortiori*, may the alleged right

to operate a lottery or fraudulent scheme, attempted to be put in operation in defiance of law, be taken away without notice or a hearing. According to these cases every scheme deemed by the government detrimental to the public morals is outlawed and, when such a case comes before the court, the only question to be considered is whether the means provided by law for the suppression of such a scheme, "are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals." If they are found to be such, it makes no difference that the power conferred may be abused or that the enforcement of the law may operate harshly on individuals. The only remedy the parties, who are affected, have in such cases, is an appeal to the legislature, or to the ballot box and not to the judiciary.

The final question then is whether the means provided by sections 3929 and 4041, Revised Statutes, and the fourth section of the Act of March 2, 1895, are reasonably necessary for the suppression of lotteries and frauds in the mails and not unduly oppressive upon individuals or not. That this question should be answered in the affirmative will appear from the following considerations:

Sec. 308. 1. The issuance of a fraud order, denying the use of the mails in toto to a party found to be operating a lottery or fraudulent scheme, is the only effective means to prevent the advertisement of such scheme through the mails. Experience shows that while the law, reaching only registered mail matter and money orders, was in force the promoters of such schemes simply resorted to express money orders or bank checks inclosed in sealed letters which could reach them without let or hindrance. The Department was powerless to prevent these promoters from reaching the people by matter sent out by them through the mails, and hence the law became a dead letter and a "fraud order," affecting registered letters and money orders only was mere *brutem fulmen*: and Congress undertook to strengthen this manifestly weak point in the law by the Act of March 2, 1895. This Act was a severe blow to the promoters of these schemes, but the practice under it has

shown that it is not absolutely effective to accomplish the purpose designed. The lottery promoters now change the address to which mail matter is to be sent and they, still having the use of the mails in sending out sealed matter, readily reach the people who are advised what the changed address is. The secretary of a lottery concern in Old Mexico changed his name or gave new names, six times in one month, the Department issuing a "fraud order" against the new names as soon as ascertained. And it is believed that the large lottery companies of Mexico and other countries are now doing an extensive business in the United States under assumed and fictitious names.

Sec. 309. The indictment and punishment of the lottery and fraudulent promoters would be utterly inadequate to suppress the evil. At best, that is a slow process, but as related to the mail service it is not only slow but very expensive. The letter or circular concerning the scheme may be written in New York and sent to a party in California and in order to convict, the witnesses must be brought from long distances at an enormous cost to the government and besides that, conviction is uncertain as it is a difficult matter to get competent evidence showing the use of the mails, in furtherance of the scheme by the accused. And again many of the schemes are consummated in a few days or weeks and before an arrest could be made the schemes would be closed up. A conviction is punitive only while the law in question provides a preventive measure.

Sec. 310. We have a population of 70,000,000 or more, a wide extent of territory and about 75,000 postoffices. We employ in the mail service over 100,000 persons at an annual cost of \$100,000,000. The administration of this vast system requires energy, promptness and precision. To make the administrative and official acts of the Postmaster-General and his subordinates subject to judicial control would be more intolerable and disastrous to the public service than to subject the Secretary of the Treasury and his subordinates to such control in regard to the collection of the public revenues.

Sec. 311. 2. But it is not true as alleged that the parties against whom fraud orders are issued have no hearing. They are heard sometimes before the orders are issued and always afterwards, if they request it. It is true the law does not provide for a hearing but that makes no difference if a hearing is had. The courts will take judicial notice of the rules and regulations of an Executive Department of the government, and they will take judicial notice also of the usual course of administration in the public offices of the country. It is a well known historical fact that in this country and England parties, feeling aggrieved by the action of the Executive Department, can be fully heard, and are heard on their request. The Hoover case is a remarkable one on this point. Judge Barr decided that the law was unconstitutional as to the order issued against Hoover, because he had had no notice and no hearing. The fact is Hoover had been heard many times, by mail, in person and by agents and attorneys, extending over a period of two years. Failing in his efforts to get the Postoffice Department to recede from its position, Hoover made his company, the Southern Mutual Bond Investment Company, which operated at Lexington Kentucky a so-called bond investment scheme, a party to the proceeding before Attorney-General Harman in 1895-6, a history of which was given in chapter III, *ante*. That proceeding was pending before the Postmaster-General and General Harman for nearly six months. The attorneys for the companies made oral arguments, lasting three days, and then prepared elaborate printed arguments, and after General Harman decided they were operating lottery schemes through the mails, Mr. Hoover went into court, alleging that he had been deprived of his property and liberty without notice or a hearing: and to cap the climax the order against him had been revoked several months before Judge Barr decided the case, Hoover having satisfied the Postmaster-General that he had severed his connection with the company and had abandoned the scheme conducted by it, so the court's injunctive order, so far as Mr. Hoover was concerned, went against a myth only. The reason why the attention of the court was

not called to the revocation of the order is not known to the writer.

Sec. 312. 3. The questions presented to the Postmaster-General under these statutes are not generally difficult of solution. As to lottery schemes they are simple indeed: but as to schemes to defraud difficulties sometimes arise, due to the fact that questions in regard to these involve a consideration of voluminous evidence. The promoter advertises his lottery scheme and is compelled to state fully his methods in order to induce the public to invest in it. The advertisement of the scheme is laid before the Postmaster-General and the facts stated in it, being signed by the promoter, and thus admitted to be true, the question whether the scheme be a lottery or not becomes one simply of law. If the Postmaster-General is in doubt about the law he takes the opinion of the Assistant Attorney-General for the Postoffice Department and if he still remains in doubt he calls upon the Attorney-General of the United States for his views and being thus fortified by the opinions of the law officer of his Department and the law officer of the government he can not go far wrong and he is no more likely to make mistakes than a court of justice is. But after a scheme is decided to be a lottery or a fraud another fact must be found by the Postmaster-General before he can issue a "fraud order" against its promoter. He must find that the promoter is using the mails in conducting the scheme. Ordinarily the promoter admits this fact and insists that his scheme is a legitimate one and he has a right to the use of the mails in conducting it. When complaint is made to the Department against a scheme alleged to be fraudulent the usual course is to send the case to a Postoffice Inspector for investigation and report, unless the scheme comes clearly under certain well recognized classes of frauds, such as the sale of counterfeit money and the like. The Inspector interviews the promoter and gets his statement in regard to his methods, and gathers all the evidence he can procure respecting the same and transmits it, with his report thereon, to the Department. If the report and the accompanying evidence makes out a case to the

satisfaction of the Postmaster-General a fraud order is issued without further notice to the promoter, but if the report is not satisfactory, sometimes the case is referred again to the Inspector with directions to make further inquiry into certain phases of the scheme and report and sometimes the promoter is asked to explain certain points in his scheme. If after all these precautions are taken there be still doubt as to the character of the scheme, the promoter is given the benefit thereof and is not molested. If the fraud order be issued, the party, against whom it is directed, is always without exception, given not one, but many hearings by mail, in person, by agent or attorney, if he desires it. There is probably no tribunal on Earth, where the facts, in cases affecting the private rights of the citizen, are more thoroughly investigated and ventilated than in the Postoffice Department. The citizen desiring to operate any scheme whatever has free access to the the postal officials at all times either by mail, in person, by agent or attorney. And the writer can truthfully say after an experience of four years as Assistant Attorney-General for the Postoffice Department that during the whole period not a mistake, with one possible exception, was made in the *issuing* of fraud orders but many were made in *revoking* them, the Department always giving the accused parties the benefit of the doubt that might exist. The mistake, if mistake it was, made in the single exception above named in the issuance of fraud orders, was promptly corrected by the Postmaster-General, when the matter was called to his attention. The writer has no doubt the other Assistant Attorney-Generals for the Postoffice Department will confirm what is here stated.

Sec. 313. 4. The denial of the authority of the Postmaster-General to issue a fraud order under the law would necessarily carry with it the denial of authority on his part to administer the postal laws and regulations in many other respects, because the principal involved in these other respects is precisely the same as in the issuing of a fraud order. The law prohibits the transmission through the mails of any circular, newspaper or pamphlet as

well as any letter advertising a lottery scheme. A circular, newspaper or pamphlet is usually carried open in the mails, i. e., unsealed, and it is made the duty of all postal officials to refuse to accept, carry or deliver any circular, newspaper or pamphlet which concerns a lottery. Under the law thousands of circulars, pamphlets and whole editions of newspapers have been rejected without notice to either the senders or addressees of such matter. The same may be said of obscene books, papers, pamphlets, circulars and pictures; and to decide without notice to the interested parties that such matter is nonmailable and to exclude it from the mails because, *in the opinion of the postal officials*, it concerns a lottery or is obscene would be as palpable a deprivation of the citizen's property or his liberty to use the mails without due process of law, as to decide without notice to any one that a party is conducting a lottery or fraudulent scheme through the mails and for that reason to issue, without a hearing, a fraud order against him. It will not do to say that no mistakes can be made in regard to open matter because it is open and is, therefore, in its nature conclusive. It is just as difficult to determine whether a scheme, advertised in a circular, newspaper or pamphlet, which is open and may be seen and read by the postal official, concerns a lottery as it is to determine the same question when the scheme is presented to the Postmaster-General for the purpose of obtaining from him a fraud order against the promoter of the scheme. In either case the official may make a mistake, i. e., he may determine that to be a lottery or fraud which is not either and a denial of the power under the law to do one necessarily implies a denial of authority to do the other. The principle involved in each case is precisely the same; if one falls, the other must go with it. But the Supreme Court of the United States held in *Ex parte Jackson*, 96 U. S. 727, that authority to exclude matter from the mails by a simple inspection of it existed. On this point the Court there said: "And as to objectionable printed matter, which is open to examination, the regulations may be enforced in a similar way by the imposition of penalties through the courts and, in some cases, *by the*

direct action of the postal service. In many instances, these officers can act on their own inspection and, from the nature of the case, must act without other proof; as when the postage is not prepaid, or where there is an excess of weight over the amount prescribed or where the object is exposed and shows, unmistakably, that it is prohibited, as in the case of an obscene picture or print. The evidence, respecting them, is seen by every one and is, in its nature, conclusive." The Court must have meant, by this statement, simply that the *evidence* in the case was conclusive and that the evidence being conclusive it was simply a matter of law as to the result to be reached by the postal official. The Court could not have meant that the official might not err in his interpretation of the evidence, for it is well known that very nice and intricate questions arise in regard to what is an obscene picture or print or what is a lottery or fraud, even in cases where the facts are undisputed and conclusive. The fact remains, however, that the official has authority, under the ruling of the Supreme Court in the Jackson case, to exclude from the mails any matter which he may decide to be non-mailable. In fact, as to open matter, this authority has never been disputed. Indeed to compel the postal officials to give notice and a hearing in such cases or to wait until the courts could decide the question would so cripple the service as to almost destroy its efficiency, and in the language of Chief Justice Taney in *Commissioners of Patents vs. Whiteley, ante*, "the interference of the courts with the performance of the ordinary duties of the executive departments would be productive of nothing but mischief." The power to exclude from the mails open matter without notice or hearing being thus recognized and being essential to the efficient operation of the postal service implies a like power when given by law to decide a scheme to be a lottery or fraud and to deprive its promoter of the use of the mails, though no provision is made for notice or hearing. That this power may be abused or its possessor may make a mistake occasionally is no argument against the existence of the power itself. Courts may make, nay, do make mistakes sometimes and sometimes they abuse the power confided

to them, but that is no reason why they should be deprived of the power to act at all. The cases heretofore cited show conclusively that this proposition is not only well settled but also rests on solid ground.

Sec. 314. In conclusion, the law in regard to the statutes under review and their administration may be summarized as follows:

1. Congress possesses, under the Constitution, plenary power over the entire mail service of the country and can, in the exercise of that power, determine what shall and what shall not be carried in the mails.

2. The statutes outlawing matters pertaining to lottery schemes and obscenity and authorizing the postal officials to exclude such matter, in a summary way, from the mails are constitutional and a valid exercise of Federal power.

3. The duty confided to the Postmaster-General by these statutes to determine, upon evidence satisfactory to him, that a person is conducting, through the mails, a lottery or fraudulent scheme and to issue a fraud order against its promoter, denying to him the right to receive any mail matter under seal, is not judicial in the sense that it can be conferred on a court only, but it is, in its nature, an administrative function, requiring the exercise of judgment and discretion and the courts have no jurisdiction, without express statutory sanction, to review the decision of the Postmaster-General, as a head of one of the executive departments of the government, on that question and that duty can be constitutionally confided to the Postmaster-General by the national legislature.

4. The right to use the mails is not an inherent, inalienable right of the citizen, but is simply a statutory right, which may be made subject to such reasonable restrictions and limitations as the legislative department may see proper to impose.

5. Congress possesses the power, under the Constitution, to exercise the police power in respect of the mail service and may lawfully authorize the exclusion from the mails of all matter which may corrupt the morals of the people or imperil their safety or health, provided the methods for such

exclusion are reasonable and not unduly oppressive upon the citizen. And lotteries, frauds, and obscenity come under this class.

6. The power conferred on the Postmaster-General by these statutes and the methods provided for their enforcement are reasonable regulations to protect the people against matter deemed prejudicial to public morals; and as a corollary of this proposition citizens may be required to submit to some inconvenience and restraint to subserve the public good in general.

7. The denial of mail facilities to the promoter of a lottery or fraudulent scheme by the issuance of a fraud order against him by the Postmaster-General in conformity to the laws of Congress is not a deprivation of his right of property or liberty "without due process of law" but is strictly "according to the law of the land," and is a valid exercise of the police power in respect of the mail service.



INDEX.

	Section.
A.	
Art Unions	86
Amusement, Playing for.....	180
Advertisement of Lotteries.....	192-197
Administration of the Law.....	Chapter VI.
Administration of the Law, Open and Sealed Matter.....	247
Administration of the Law, Open Matter, Disposition of.....	249
Administration of the Law, Sealed Matter.....	250
B.	
Blanks not Necessary in a Lottery.....	69, 70
Bond Investment Schemes, History of.....	147-9
Bond Investment Schemes, Hearing Before the Attorney-General, and His Decision Thereon	157-160
Bond Investment Schemes.....	147-169
Bonds of Government and Railroads selected for Payment by lot...	161
Bond Investment Schemes, Change of Policy in Regard to.....	162
Bonds Redeemable by Chance.....	173
Bonds, Premium.....	190-191
Bond Investment Schemes in England.....	163-165
Bazaars May Involve Lottery.....	76
Base Ball Matches, Pool selling on	142
Base Ball Matches, Naming Winning Team.....	146
Bucket Shops, as Frauds.....	208-209
C.	
Consideration the, Required in a Lottery Scheme.....	14-16
Consideration in Lottery Need Not be Money or Property, May be Valuable Service	15
Consideration, General Rule in Regard to, When no Property or Money is Paid.....	16
Chance, What is.....	22a et seq.
Chance as defined by Lexicographers.....	24
Chance, Misconceptions as to.....	26-28
Chance, Pure, Not Essential to a Lottery.....	28a-29
Chance in General	67, 68
Chance Essential Element of a Lottery.....	12
Chance, Prizes Dependent upon, Option Deals.....	30-42

Chance, Prizes Dependent upon, Horse Racing.....	46-56
Chance, Prizes Dependent upon; Miscellaneous cases.....	57-68
Chance, Dependent upon the Will of Another.....	90-93
Chance, Amount of Prizes Dependent on.....	100-102
Chance as to Contents of Vessels, etc.....	132-136
Chances, All Taken by Same Party.....	183
Chain Letter Schemes, as Lotteries.....	105
Competitive Contests.....	106-110
Consideration, Essential Element of Lottery.....	12
Clubs to Buy Articles.....	184, 185
Covers, Outside, Objectionable Matter on.....	235-239
Constitutional and Legal Questions.....	251 et seq.
Corporations are Persons.....	291
Citizen, Right of to use Mails.....	294

D.

Drawing not Necessary in a Lottery.....	70
Definition of Gift Concerts and Gift Enterprises.....	72-76
Delineations, What are.....	240
Due Process of Law.....	251 et seq.

E.

Envelopes, Objectionable Matter on.....	235-238
---	---------

F.

First Successful Competitor, Offering Prize to, a Lottery.....	99
Fairs may be Lotteries.....	76
Frauds, Schemes or Artifices, Statutes in Regard to.....	198
Frauds, "Indentification Clause" in the Law.....	199
Frauds, What is a Scheme or Artifice to Defraud.....	200
Frauds, Classified.....	202
Frauds Involving the Exercise of Supernatural Power.....	218
Fraud, the Disc Case.....	204
Frauds, Power to Discover Hidden Treasure.....	205
Frauds, Power to Answer Sealed Letters.....	207
Frauds, Fortune Tellers.....	207
Frauds, Bucket Shops.....	208, 209
Frauds, "C. O. D. Business".....	210
Frauds, Collection Agencies.....	211
Frauds, So-called Newspaper Laws.....	211
Frauds, Miscellaneous Schemes.....	212-233
Frauds, Flag Signal Schemes.....	212
Flag Signal Scheme.....	212
Frauds, Conspiracy to get Goods Without Pay.....	213
Frauds, Counterfeit Money Scheme.....	214
Frauds, Intent to Defraud Generally.....	214
Frauds, Case of Procuring Patents.....	215
Frauds, Pretence of Having Official Letter.....	221

Fraud, Under Statute Defined.....	216, 220
Frauds, Inclosing Worthless Slips of Paper in Letter.....	217
Fraud Sending Silk Thread Instead of Silk Cloth.....	218
Fraud, Large Fortune Scheme.....	219
Fraud, Intent to Defraud one Person Enough.....	221
Fraud, Changing Post-Mark of Letter to Effect.....	216
Fraud, Selling Article of one Quality and Delivering Another Quality.....	223
Fraud, Inducing Person to go to Place at Great Expense.....	224
Fraud, Marked Cards for.....	225
Fraud, Sending Articles by Mail Without Orders.....	226
Fraud, Pretense of Being Merchants.....	227
Fraud, Pretense, of Wanting to Employ Agents.....	228-229
Fraud, an Intent to Defraud Necessary.....	201
Fraud, Selling one Kind of Plant and Delivering Another.....	230
Fraud, Sale of Mining Stock.....	233
Fraud, Town Lot and Land Schemes.....	232
Fraud, Each Case Depends Upon its Own Facts.....	235
Fraud, Machine to Indicate When to Buy and Sell Stock.....	234
Fraud Order, Form of.....	250
Fraud Order, Influence on the Law.....	248
Fraud Order, Only Effective Means.....	308

G.

Gift Concerts, Gift Enterprises.....	72 et seq.
Gift Concerts, What are.....	72-76
Gift Concerts, Element of Chance Necessary in.....	72-74
Gift Enterprises, Miscellaneous Schemes.....	77-92
Guessing Contests.....	90
Guessing Contests Where Statistics Ought to be Considered.....	125-130
Guessing as to Number of Male and Female Births and Deaths.....	125
Guessing as to Number of votes, etc., at Election.....	126-130
Guessing as to Number of Bales of Cotton, etc.....	129
Guessing as to Number of Words in Column of Newspaper.....	129
Guessing as to amount of Bank Clearances.....	129
Guessing as to Population of the United States.....	131
Guessing Contests as to Contents of Vessels and Weight of Soap.....	132-137a
Guessing as to number of buttons in jar.....	136
Guessing as to number of beans in jar.....	134, 135
Guessing as to Seeds in Watermelon.....	137a

H.

History of Lotteries in Europe.....	1, 2
History of Lotteries in the United States.....	3
History of Lottery Legislation by Congress.....	4
History of Anti-Lottery Legislation by Congress.....	5, 6
Horse Races as the Basis of Lottery Schemes.....	138-146
Horse Races, Choosing of Horse by lot.....	138, 139

Horse Races, Prize for Naming Winning Horse.....	140, 141
Horse Races, Pool Selling on.....	102, 142-145

I.

Indictment, Not Effective to Suppress Lotteries, etc.....	309
Insurance, Defference Between it and a Lottery.....	157, 158

L.

Lottery, Definition of, General Rules as to.....	7
Lottery, So-called Gift Concerts, Gift Enterprises and Similar Enterprises Offering Prizes Dependent upon Lot or Chance.....	7
Lottery, Definition of.....	10, 11
Lottery, Essential Elements of.....	12
Lottery, The Consideration in.....	14-16
Lottery, The Element of Lot or Chance in.....	22a
Lotteries, History of in Europe.....	1, 2
Lotteries, History of in the United States.....	3
Lotteries, Legislation by Congress against.....	5, 6
Lotteries, Legislation by Congress in favor of.....	4
Lottery, Dependent upon the Result of another Lottery.....	111
Lotteries, Land.....	114-124
Lottery, Act in Relation to.....	6
Lottery, Wager Element in.....	13
Lottery, Non-Essential Elements of.....	69
Lottery, Method of Drawing Need Not be Named.....	69
Lottery Schemes.....	71 et seq.
Lottery, Bazaars, Fairs, Etc.....	76
Lottery Schemes, Miscellaneous Cases.....	176-191
Lottery, Estimate of Yield of Wheat.....	176
Lottery, Slot Machine.....	177, 178
Lottery Gambling. Amusement.....	180
Lottery. Wheel With Numbers.....	181
Lottery, Envelopes with Numbered Slips.....	182
Lottery, Chances all Taken by Same Person.....	183
Lottery, Club Schemes to buy Articles.....	184, 185
Lottery, Box With Numbers in it.....	186
Lottery, Stock Clock.....	189
Lotteries, and the Public Press.....	192-197
Law, Administration of by the Postoffice Department.....	Chapter VI.
Law, Method of Administration of.....	247
Law of the Land.....	294
Laws of Congress as they Stand Now.....	6
Letter. Chain Contests.....	92

M.

Mystery Story Contests as Lotteries.....	103
Missing Word Contests.....	90, 91

N.

Numbered Papers.....	91
Number on Bill	91
Number of Bicycle.....	91
Number Contests.....	92
Notice to Operators of Lotteries and Frauds.....	311
Notice, Judicial, Taken of Rules of Executive Department and Course of Administration.....	311

O.

Obscene Matter in the Mails, History of Legislation in Regard to..	241
Obscene Matter in the Mails, Medical Pamphlets, Circulars, Etc...	242
Obscene Matter, Sealed Letter in Relation to	244
Obscene Matter defined.....	242
Obscene Matter, Ignorance of Character of	246

P.

Prize, The Element of in a Lottery Scheme.....	12-17
Prize, Definition of.....	17
Prize in Bond Investment Schemes.....	18
Prize, Where Different Articles alleged to be of the Same Value are Given.....	19
Prize in a Lottery Scheme Must be a Wager.....	20
Prize, as Defined by the Courts.....	20, 21
Prize Dependent upon Lot or Chance.....	30 et seq.
Prizes Dependent upon Chance, Option Deals.....	30-45
Prizes Dependent on Chance, Horse Racing.....	46-56
Prize to First Successful Competitor.....	99
Prizes Dependent upon Lot or Chance.....	57-68
Prizes, Blanks in.....	70
Prizes, Where Amount of Depends on Chance.....	100-102
Prize for Best Name of Town.....	108
Prize for Best Name of Paper.....	109
Prize Fights, Naming Champion in.....	146
Probability, What is.....	28
Public Press.....	192-197
Postal Cards, Objectional Matter Thereon.....	236, 237
Power of Congress over the Mails.....	252
Postmaster-General, Power of Under the Law.....	247, 248
Power Judicial and Administrative.....	254 et seq.
Power of Judiciary over Executive Department.....	254 et seq.
Power of the Postmaster-General Under Sections 3929 and 4041. R. S.....	254 et seq.
Power of the Postmaster-General Under the Act of March 2, 1895, ...	288 et seq.
Police Power, Nature of.....	295 et seq.
Police Power Applies to Lottery Schemes.....	305
Post Office Establishment, its Extent and Importance.....	310
Poney, How far Travel.....	91

Q.

Questions presented to Postmaster-General not Difficult. 312

S.

Slot Machines A Lottery.....177, 178

Stock Clock, Lottery..... 199

U.

Unions, Art..... 86

Unreasonable Seizure and Search, What 291a

V.

Voting Contests 175a, 175b

W.

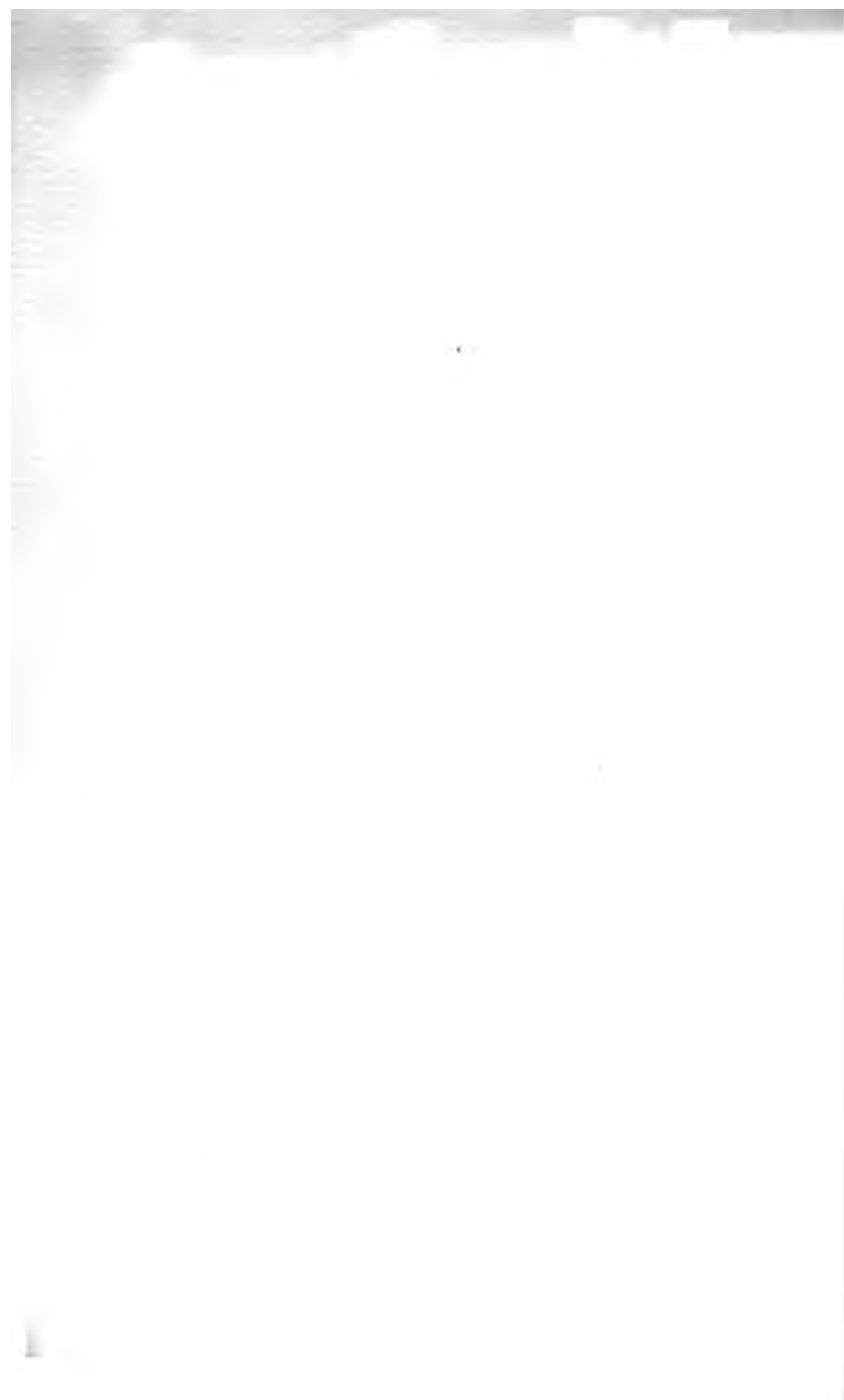
Word Contests..... 104

Wager, Essential Element of Lottery.....12, 13

Watch, When it Would Stop..... 91

Wrappers, Objectionable Matter on.....235-239









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